Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

TOLEDO, PEORIA & WESTERN RAILWAY,
Petitioner,

v.

SURFACE TRANSPORTATION BOARD AND UNITED STATES OF AMERICA
Respondents,

and

KEOKUK JUNCTION RAILWAY COMPANY,
Intervenor-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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December 6, 2006

QUESTION PRESENTED

Whether the Surface Transportation Board's valuation of the net liquidation value of a railroad line, which was based in part on a sixteen-month average for the price of steel rather than the fair market value of steel at the time of the taking of the railroad's property, violated the Fifth Amendment's requirement of just compensation, when that valuation resulted in the railroad receiving $3 million less than the market value of its property.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner Toledo, Peoria & Western Railway was the petitioner in the court of appeals seeking review of an order of the Surface Transportation Board.

Respondents Surface Transportation Board and the United States of America, along with Intervenor Keokuk Junction Railway Company, were respondents in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner Toledo, Peoria & Western Railway, pursuant to Supreme Court Rule 29.6, states as follows:

Toledo, Peoria & Western Railway's parent corporation is RailAmerica, Inc., which is a publicly held corporation, and the only publicly held corporation that owns 10% or more of Toledo, Peoria & Western Railway's stock.

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OPINIONS BELOW

The opinion of the United States Court of Appeal for the Seventh Circuit, a copy of which is reproduced in the Appendix ("Pet. App.") at 1, is reported at 462 F.3d 734.

The October 28, 2004, sale decision of the Surface Transportation Board (Pet. App. 83) is reported at 2004 WL 2619769.

The February 7, 2005, decision on reconsideration of the Surface Transportation Board (Pet. App. 52) is reported at 2005 WL 281909.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on September 7, 2006. The jurisdiction of this Court rests on 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Staggers Rail Act of 1980 provides, in relevant part:

> For purposes of this subsection, the constitutional minimum value of a particular railroad line shall e presumed to be not less than the net liquidation value of such line or the going concern value of such line, whichever is greater.

49 U.S.C. § 10907(b)(2).

STATEMENT OF THE CASE

I. Procedural history.

On April 9, 2003, Keokuk Junction Railway Co. ("KJRY") filed a feeder line development program ("feeder

line") application with the Surface Transportation Board ("Board") pursuant to 49 U.S.C. § 10907 and 49 C.F.R. Part 1151. Under 49 U.S.C. § 10907, the Board is directed to require a railroad to sell a rail line, which the incumbent railroad either has slated for abandonment or is not adequately serving, when a financially responsible person applies to buy the line at a price not less than the constitutional minimum value. KJRY was seeking to acquire a rail line owned by Toledo, Peoria & Western Railway ("Toledo") extending between milepost 194.5 at LaHarpe, Illinois and milepost 118.5 at Hollis, Illinois (the "Line").[1]

On May 9, 2003, the Board found that KJRY's initial application was deficient. On June 9, 2003, KJRY filed an amended application. In a decision served on July 9, 2003, the Board accepted KJRY's amended application. On October 28, 2004, the Board issued its initial decision ("*Sale Decision*"), which determined that KJRY's application met the statutory requirements under 49 U.S.C. § 10907 and calculated the constitutional minimum value of the Line as $3,940,756. On November 29, 2004, Toledo filed a petition to reconsider the Board's October 28, 2004 decision. On February 7, 2005, the Board issued a decision granting, in part, and denying, in part, Toledo's petition for reconsideration. The Board's February 7, 2005 decision affirmed KJRY's right to acquire the Line but reset the purchase price for the Line to $4,165,742.

On April 7, 2005, Toledo filed a timely Petition for Review of the Board's Order in the United States Court of Appeals for the Seventh Circuit. That Court had jurisdiction pursuant to 28 U.S.C. §§ 2321 and 2342, and Rule 15 of the Federal Rules of Appellate Procedure. On September 7, 2006,

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[1]In addition to the Line, KJRY also initially sought to acquire a connecting segment from Toledo known as the Mapleton Industrial Spur but KJRY eventually withdrew its request to acquire that spur.

the Seventh Circuit entered its judgment denying Toledo's Petition.

II. Factual background.

Toledo is a Class III railroad controlled by RailAmerica, Inc., a noncarrier holding company. R. Doc. 33747 at 1.[2] Toledo operated the Line, a 76-mile railroad line extending east from LaHarpe, Illinois (milepost 194.5) to Hollis, Illinois (milepost 118.5). R. Doc. 209135. At LaHarpe, on the western end, the Line connects to a railroad line operated by KJRY. From Hollis eastward to East Peoria, Toledo uses trackage rights over other railroads. Toledo's east-west mainline begins at East Peoria and continues east into Indiana. R. Doc. 207572 at 3. A 2.5-mile portion of the track curves southeasterly from the main line at milepost 121.6 and runs through an area of intensive rail-served industrial development. It represents the core of Toledo's business. R. Doc. 209135 at 108 (Cecil Verified Statement ("v.s.")). This 2.5-mile portion is known as the Mapleton Industrial Spur (the "Mapleton Spur") and remains an operation of Toledo. R. Doc. 33747 at 1.

A. The Board determined that KJRY's initial Feeder Line Application was deficient.

On April 9, 2003, KJRY filed a feeder line application (the "Application") with the Board, pursuant to 49 U.S.C. § 10907 and 49 C.F.R. Part 1151, seeking to force Toledo to sell the Line and the Mapleton Spur to KJRY at a price specified by the Board. R. Doc. 207572 at 1. KJRY is a Class III railroad and a subsidiary of Pioneer Corporation ("Pioneer"), a railroad holding company. *Id.* at 5.

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[2]Citations to the Record herein are to the document numbers assigned to each document by the Board, and then to the internal page thereof.

As it was required to do under 49 U.S.C. § 10907, KJRY calculated what it proposed was the constitutional minimum value of the Line. *Id.* at 11-19. Under § 10907, a line's constitutional minimum value is defined as the higher of either the line's: (a) net liquidation value ("NLV") or (b) going concern value ("GCV"). KJRY's valuation of the Line was based only on KJRY's estimate of the Line's NLV. *Id.* NLV, in turn, is determined by adding the Line's real estate value with the net salvage value ("NSV") for the rail track and other materials in the Line. October 28, 2004 Decision, 2004 WL 2619769 at *8 (Pet. App. 100). In the application, KJRY estimated the NLV of the Line to be $3,393,363 ($3,283,504 for the Line's NSV and $109,859 for real estate). R. Doc. 207572 at 11.

To support its NSV estimate, KJRY relied on two lists of track materials that had been prepared by Toledo as part of a previous effort to sell the western portion of the Line, a 71.5-mile segment between milepost 194.5 near LaHarpe, Illinois, and milepost 123, known as SF&L Junction (the "Western Segment"). *Id.* KJRY referred to the portion of the Line between milepost 123 and milepost 118.8 as the "Mapleton Segment" (sometimes referred to herein as the "Eastern Segment"). *Id.* at 4. KJRY also attached to its application a purported evaluation of the Line performed by John Gohmann ("Gohmann") of Gohmann and Associates. *Id.* (Gohmann v.s.) at 173.

On April 24, 2003, Toledo filed a Petition to Reject KJRY's Application. The Board issued an order on May 9, 2003, finding KJRY's Application to be deficient. R. Doc. 33586 at 2-3 because it did not have a GCV for the Mapleton Spur.

B. KJRY then submitted a second Feeder Line Application.

On June 9, 2003, KJRY filed a second application, which it termed as "Supplemental Evidence," supporting its initial Application. R. Doc. 208011 at 2. In the "supplemental" application, KJRY offered to purchase the Line and the Mapleton Spur for a GCV of $3,461,431. *Id.* at 15-20. In the alternative, KJRY offered to withdraw its attempt to acquire the Mapleton Spur, and purchase the remaining Line based on an estimated NLV of $3,284,605. *Id.* at 21. The adjusted NLV offer was based on its prior offer of $3,393,363 less the pro rata NLV of the Mapleton Spur, $108,758. *Id.* On July 1, 2003, the Board accepted KJRY's supplemented application, R. Doc. 33747.

C. Toledo also submitted evidence regarding the Line's NSV.

On October 16, 2003, Toledo filed its Comments in opposition to KJRY's Application. R. Doc. 209135 at 1. In its comments, it included the verified statement of Mark Garvin ("Garvin). R. Doc. 209185 (Garvin v.s.) at 87. Garvin was the Chief Engineer for the railroads controlled by RailAmerica and worked in the rail industry for 18 years. *Id.* One of his duties was to determine track and materials NLV's for railroad purchases and sales. *Id.* at 87-88. Garvin stated that his valuation of the Line was based on Toledo's most recent records and his physical inspection of the Line. *Id.* at 88. The four exhibits to his statement listed the quantity and quality of track and material on the Line. *Id.* at 95-103.

He used the latest track charts and a "hi-rail" inspection of the Line on September 8 and 9, 2003, to further assess and confirm the amount of material on the Line and its quality. *Id.* at 89. Garvin divided the rail and "other track materials" ("OTM"), including tie plates, spikes, joinders (connecting rail lengths), and gauge bars, into three categories: (a) "re-

lay" quality, i.e., rail and materials that would or could be reused by Toledo for other track, (b) "reroll" quality, which was one grade better than scrap steel and which would typically be sold to reroll mills for making fence posts and rebar for concrete; and (c) scrap. *Id.* at 89-90. He calculated the amount of each type of rail and OTM on the Line and submitted proof of their respective values. *Id.* at 96-102.

Garvin submitted evidence that relay rail was being sold in western Illinois at that time for prices between $450.00 and $280.00 per ton (depending on the weight or classification of the rail). *Id.* at 96-102. He determined, based on recent sales and Toledo purchases, that reroll rail had a unit price of $158.00 per ton and that scrap rail had a unit price of $102.00 per ton. *Id.* at 89, 96-102. With respect to OTM, Garvin determined that relay materials on the Line had a value of $185.00 per ton and that OTM scrap had a value of $110. *Id.* at 96-102.

For the Western Segment, Garvin determined that the rail had a total value of $4,028,574 and the OTM had a value of $983,094. For the Eastern Segment, he found that the rail had a value of $321,211 and the OTM a value of $70,097. Garvin further calculated the number and value of the "turnouts" and signal crossings on the Line. *Id.* 89-90, 96-102.

Garvin next determined the various costs of dismantling, removing and transporting the different types of rail, turnouts and signals on the Line. This resulted in a cost of $1,502,553 to salvage the Line ($1,397,654 for the Western Segment and $104,899 for the Eastern Segment). According to Garvin, the materials on the Line had a net salvage value of $4,790,733 ($4,410,920 for the Western Segment and $379,813 for the Eastern Segment). *Id.* at 90-98.

D. KJRY submitted its reply to Toledo's comments challenging Garvin's value of the track.

On November 7, 2003, KJRY filed a Reply in support of its application. R. Doc. 209359. In its Reply, KJRY withdrew its offer to purchase the Mapleton Spur and only sought to acquire the LaHarpe to Hollis Line. *Id.* at 5. With respect to the constitutional minimum value of the Line, KJRY asserted that the proper NLV and proper sale price was $3,321,745. *Id.* at 8-9. Despite the fact that KJRY was submitting a Reply, it asserted that its new valuation was based not only on a review of the information provided in Toledo's comments but also on "additional inquiries and analyses conducted by KJRY's independent experts[.]" *Id.* at 8.

In support of its Reply, KJRY attached another verified statement from Gohmann, which alleged that Garvin's calculations overstated the value of the track and other materials on the Line. *Id.* at 41. KJRY also criticized Toledo's real estate valuation based on a title opinion from Brian Mooty ("Mooty"), an Illinois real estate attorney. *Id.* KJRY claimed, based on Mooty's analysis, that Toledo only held marketable title to 31 acres of the right-of-way. R. Doc. 209359 at 51.

Finally, KJRY attached its own real estate valuation in the form of a verified statement from L. Arlen Higgs ("Higgs"), a residential real estate appraiser. *Id.* (Exhibit 11, L. Arlen Higgs v.s.) at 1-7. Higgs recognized that KJRY's submission of real estate value evidence may be improper, stating, "Though, as I understand it, KJRY may not be free to submit a complete appraisal report at this stage of the proceeding, I can say that if I were submitting an appraisal, it would show a much lower value than Mr. Cecil's report." *Id.* at 2. Higgs criticized Cecil's valuation, which was based on 54 recent real estate sales, claiming that the sales were not comparable. *Id.* at 6. He instead based his valuation upon

greater discount percentages due to the physical nature of the parcels and on only six "comparable" sales of parcels located on abandoned rail rights of way during the previous seven years. R. Doc. 209359 at 52. KJRY estimated that Toledo's fee interests in the land were worth $37,140. *Id* at 43.

E. Toledo tendered updated evidence on the current market value of steel.

On March 17, 2004, Toledo filed a petition to supplement the record with a verified statement from Garvin. R. Doc. 210324 (Garvin v.s.) at 8. Garvin submitted evidence that, since the Application was pending, the prices for scrap steel had approximately doubled from $110.00 per ton to $230.00 to $250.00 per ton. *Id.* at 8-14. Garvin amended the charts attached to his prior verified statement to reflect the current scrap steel prices in his rail and OTM valuations as relevant to the NLV of the Line. *Id.* at 10-14. According to Garvin, the adjusted NLV for the Line, not including real estate values, based on the current value of scrap steel was $5,866,930 ($5,452,270 for the Western Segment and $414,660 for the Eastern Segment). *Id.*

On March 29, 2004, KJRY filed a Reply contesting the admission of the current price of scrap steel offered by Toledo. R. Doc. 210419 at 1.

F. The Board's October 28, 2004 Decision accepted KJRY's Application and set the Line's constitutional minimum value At $3.9 million.

On October 28, 2004, the Board issued its *Sale Decision* granting KJRY's feeder line application and requiring that Toledo sell the 76-mile Line to KJRY for $3,940,756. October 28, 2004 Decision, 2004 WL 2619769 at *20 (Pet. App. 125). With respect to its valuation of the Line, the Board determined that the Line should be valued based on its NLV, "which consists of the salvage value of the physical assets and

the value of the land." *Id.* at *8 (Pet. App. 100). The Board valued the physical assets of the Line entirely based on the data submitted by Garvin, on behalf of Toledo, as to the Line's total materials and tonnage. *Id.* at *9-10, 11-12 (Pet. App. 101-02, 106-07). The Board's NLV analysis employed the same three rail and OTM categories that Garvin defined in his verified statement, as attached to Toledo's Comments in opposition to the Application: (1) relay; (2) reroll and (3) scrap. *Id.*

In calculating the constitutional minimum value of the Line, however, the Board refused to accept the updated evidence of the market price for scrap steel, as established in Garvin's verified statement. R. Doc. 210324 at 8. Instead, the Board chose to value scrap steel by averaging its value on the first day of each month from April 2003 through July 2004. October 28, 2004 Decision, 2004 WL 2619769 at *11-12 (Pet. App. 106-07). In support of its decision to average former steel prices to determine the constitutional minimum value of the Line, the Board stated as follows:

> [i]n view of the recent volatility in the scrap iron and steel reroll markets and the time that has elapsed since this case was filed, it would not be appropriate to select a single date for the purpose of pegging a price for these commodities.
>
> Rather, we average the price of scrap over the time period involved (April 2003 – July 2004).
>
> Our valuation uses a unit price for scrap steel of $157.16 per ton, the composite monthly average for the No. 1 heavy metal steel scrap from April 2003 (the month the feeder line application was filed) through July 2004 (the last month of available data). . . .

Id. at *11 (Pet. App. 105-06) (citations omitted).

Using this averaging method, the Board determined that the Line had a gross salvage value of $5,362,674. The Board then valued the costs of removing these materials at $1,463,553, leaving the Line's NSV at $3,899,121. *Id.* at *12 (Pet. App. 108).

Thus, the Board determined that the Line had a total NLV of $3,940,756 (NSV of $3,899,121 plus a land value of $41,635). *Id.* Toledo filed a petition to stay the enforcement of the Board's October 28, 2004 order. That order, however, became effective on November 27, 2004. *Id.* at *21 (Pet. App. 125).

G. Toledo filed a Motion for Reconsideration that argued that the Board's valuation provided Toledo with less than the current market value of its property.

On November 29, 2004, Toledo filed a Petition for Reconsideration of the Board's decision requiring Toledo to sell the Line to KJRY for $3,940,756. R. Docs. 212639 & 212640. In its Petition, Toledo argued, *inter alia*, that the Board failed to follow its own precedent in determining the value of scrap and reroll steel by using a composite monthly average of steel prices per ton starting from April 2003 instead of using the current value of steel as of November 1, 2004, near the time of the taking. R. Doc. 212639 at 12-18.

Toledo further addressed the value of scrap and reroll steel in its Petition which had been requested by the Board in its October 28, 2004 decision. R. Doc. 212639 at 26-36. Toledo submitted another verified statement from Garvin that attached a chart showing the price for scrap steel and reroll rail as of the first day of each month from April 2004 through November 2004. R. Doc. 212639 at 26-36. As of November 1, 2004, scrap steel had a value of $240 per ton and reroll had a value of $325 per ton. *Id.* at 36. Adjusting the NLV based

on these present steel values and adopting certain other valuations of Line materials accepted by the Board in its October 28, 2004 Decision, Garvin calculated that the NLV for the Line was $7,128,723, using the figures published in the AMERICAN METAL MARKET, and $7,077,953, using the figures published in IRON AGE. *Id.* at 27.

H. The Board's February 7, 2005, Decision denied, in part, Toledo's Petition but reset the constitutional minimum value of the Line to $4.1 million.

On February 7, 2005, the Board issued its Decision on Toledo's Petition for Reconsideration. February 7, 2005 Decision, 2005 WL 281909 (Pet. App. 52).

With respect to the scrap and reroll steel issue, the Board rejected Toledo's request that the Board value the Line based on current market prices for steel, as opposed to simply using an average of past steel prices from 2003 to 2004. *Id.* at *10-11 (Pet. App. 73-74). Rather, the Board accepted KJRY's submission regarding average prices per ton for reroll rail from April 2003 through May 2004. As it did for scrap steel, the Board averaged the two values into a composite price of $175.04 per ton for reroll rail which in turn raised the Line's NSV by $127,828 to a total of $4,026,948. *Id.*

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's Opinion, denying Toledo's Petition for Review from the Board's February 7, 2005, reaches a conclusion that conflicts with the decision of this Court in *Kirby Forest Indus. Inc. v. U.S.*, 467 U.S. 1 (1984), resulting in a calculation of the NLV of the trackage in a manner that fails to compensate Toledo an amount that meets the constitutional minimum value required under Section 10907 of the Staggers Rail Act of 1980, 49 U.S.C. § 10907(b)(2) ("the Act"). In so doing, the Seventh Circuit incorrectly concluded that Toledo failed to preserve its argument that the Board's

valuation of the scrap steel violated the Fifth Amendment's guarantee of just compensation. *Toledo, Peoria & Western Ry. v. Surface Transp. Bd.*, 462 F.3d 734, 744 n.16 (7th Cir. 2006) (Pet. App. 27).

I. The Board's valuation of the Line's scrap steel fails to meet the Fifth Amendment's requirement of just compensation.

Pursuant to 49 U.S.C. § 10907, the Board calculated the "constitutional minimum value" of the Line, which the Board based on the Line's NLV. NLV consists of the Line's real estate value along with its NSV. *See* October 24, 2004 Decision, 2004 WL 2619769 at *8 (Pet. App. 100). The NSV, in turn, is determined by calculating the fair market value for the track materials on the Line (rail line, track siding, ties, ballasts, etc.), less the removal cost for these materials. *Id.* Here, the Board calculated the NSV of the track and materials on the Line based on a sixteen-month monthly average for steel prices for the period of April 2003 – July 2004. Using these average steel prices, the Board determined that the Line had a gross salvage value of $5,362,674 and, with salvage costs calculated at $1,463,553, a NSV of $3,899,121. *Id.* at *12 (Pet. App. 108).

Despite Toledo's objections, the Board did not consider steel prices at the time that it rendered its decision, October 2004, nor did it attempt to determine, or allow the parties to submit evidence of, steel prices when Toledo was paid for the Line, February of 2005. This resulted in an enormous shortfall in the valuation of the Line based on steel prices after July 2004. For example, on November 1, 2004, the date nearest the Board's initial decision, the market value of scrap steel was $240 per ton (as opposed to the Board's figure of $157), and the value of reroll was $325 per ton (as opposed to the Board's figure of $175).

Based on these market prices, the taking award valued the Line at over $3 million less than its true market value. In this regard, the Board's valuation of the Line violated the Fifth Amendment and was arbitrary and capricious.[3]

II. Toledo properly preserved the issue of whether the Board's valuation of the scrap steel violated the Fifth Amendment's guarantee of just compensation for property.

The Seventh Circuit erroneously concluded that Toledo did not raise a Fifth Amendment challenge to the Board's valuation methodology before the Board. *See Toledo*, 462 F.3d 734, 744 n.16 (Pet. App. 27). The forced sale of a railroad under Section 10907, however, constitutes a taking within the purview of the Fifth Amendment. *See e.g., In the Matter of Valuation Proceedings*, 445 F. Supp. 994 (Reg'l Rail Reorg. Ct. 1997) at 1015-16. Indeed, the Act requires that the party divested of property under its provisions be paid "the constitutional minimum value" of the property taken. *See* 49 U.S.C. § 10907. Thus, implicit in the statutory phrase "constitutional minimum value" is that the price paid for railroad property taken under the Act must satisfy the Fifth Amendment's guarantee of just compensation.

In its Petition for Reconsideration ("Petition") before the Board, Toledo introduced its arguments by noting that the price the Board set for the property being acquired did not

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[3]Using steel prices as of November 1, 2004, Garvin determined that the Line's NSV was approximately $7 million, which was over $3 million greater than the Board's valuation based on average steel prices. While not contained in the record, the market value of steel in February 2005 (the month of the taking) was similar to the prices in November of 2004. Assuming this court issues the writ, Toledo will not request this Court to determine that value but merely to remand this matter to the Board so that it may then determine the fair market value of the Line at the time of the taking.

meet the constitutional minimum value. R. Doc. 212639 at 6. The Board, in its *Sale Decision*, concluded "that the Line has a constitutional minimum value of $3,940,756." October 28, 2004 Decision, 2004 WL 2619769 at & 8 (Pet. App. 100). Challenging that valuation, Toledo argued in Section II.C of its Petition[4] that the compensation it was awarded was inadequate under the formula used by the Board in arriving at the steel's net salvage value. R. Doc. 212639 at 17-18. Inherent in any argument challenging a Board's valuation of property taken under the Act is in fact a challenge to whether that valuation provides just compensation for the property taken as required under the Fifth Amendment. Thus, Toledo did in fact challenge the Board's determination of the value of the steel in its Petition for Reconsideration as constitutionally inadequate.

III. Because Toledo properly preserved its constitutional challenge to the Board's valuation of the steel, the Seventh Circuit reached its conclusion employing the wrong analysis.

The Seventh Circuit accorded the Board great deference in reviewing its valuation determination and held that the Board's action was not arbitrary or capricious. *Toledo*, 462 F.3d at 745-46 (Pet. App. 27-32). Given that Toledo did preserve its constitutional argument, however, this Seventh Circuit's should have reviewed the Board's decision *de novo*. Employing such a review, and guided by this Court's holding in *Kirby Forest Indus. Inc. v. U.S.*, 467 U.S. 1 (1984), the only conclusion to be reached is that the Board's valuation of the scrap steel is inadequate.

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[4]Section II bears the point heading "The Board did not value the Line at the constitutional minimum value as required by 49 U.S.C. 10907(b)(2)." R. Doc. 212639 at 10. Subsection II.A addresses the Canton to Hollis line. *Id.* Subsection II.B addresses the valuation of the land. *Id.* at 12.

Just compensation, this Court has held, "means in most cases the fair market value of the property on the date it is appropriated." *Id.* at 10 (citing *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511-13 (1979)). Here, Toledo argued below that the taking occurred in February 2005 following the Board's February 7, 2005 decision. Yet, the Board used a calculation based on the monthly average price of steel for the period April 2003 through July 2004.

In its Opinion, however, the appellate court initially dismissed Toledo's *Kirby Forest* argument as waived because (1) Toledo did not rely on *Kirby Forest* in its argument to the Board and (2) Toledo urged the Board to set a valuation date of November 2004. *Toledo*, 462 F.3d 747 (32-34). First, although it is true that Toledo did not cite *Kirby Forest* to the Board in its Petition, the arguments it did raise, and supporting case law provided, urged that the Board set a value on the date of the taking (that is, the date of the *Sale Decision* (*see* Petition (R. Doc. 212639) at 18)), which is the result this Court reached in *Kirby Forest*. Thus, the argument, if not the precise case, was before the Board and therefore was not waived. Second, it is also true that Toledo, in its Petition for Reconsideration filed on November 29, 2004, urged the Board to set the valuation at the then-prevailing price of steel. That argument, of course, assumed that the date of the taking would occur following the Board's decision on the Petition for Reconsideration. At that time, however, Toledo could not have foreseen what that price would be when the Board ultimately ruled on the Petition, which was February 7, 2005. Accordingly, the theme that has remained constant in all of Toldeo's arguments at all levels is that the just compensation to which it is entitled is the price of the steel on the date of the taking.

Following its determination that Toledo had waived any argument based on *Kirby Forest*, the appellate court nonetheless did address, and then dismiss, the applicability of

that case's holding under the facts here, noting that it "involved a factual scenario that is not analogous to the present case." *Toledo*, 462 F.3d at 747 (Pet. App. 33). Specifically, the court stated that *Kirby Forest*'s requirement that the fair market value of property taken be determined as of the date of the taking is inapplicable "'when market value [is] too difficult to find, or when its application would result in a manifest injustice to the owner or public.'" *Id.* (Pet. App. 34) (quoting *Kirby Forest*, 467 U.S. at 10 n.14). This view of *Kirby Forest*'s reasoning, however, fails to take into account that in this case the fair market value of the Line's steel would have been easily determined by simply looking to any reputable market report for the price of steel in February 2005. No complicated formulae need be employed, nor any multi-step mathematical equation, just a look at the publicly reported price of steel will establish its fair market value. Indeed, the Board itself provided this appellate court with such publicly reported information in Exhibit C to its Brief filed in the Seventh Circuit.

Accordingly, Toledo properly argued in the court below that *Kirby Forest* requires that the fair market value of its steel be determined as of February 2005, the date of the taking. Further, Toledo's reliance on *Kirby Forest* under the facts here is appropriate because this is not a case where "market value is too difficult to find, or when its application would result in a manifest injustice to the owner or the public." 467 U.S. at 10 n.14. To the contrary, a manifest injustice will result to the owner—Toledo—if the date of the valuation is not set as of February 2005.

IV. Under the correct analysis, the appropriate date to fix the NLV of the steel is February 2005.

In evaluating a constitutional taking under the Fifth Amendment, this Court has held, in no uncertain terms, that a property owner constitutionally is entitled to receive the fair market value of its property as of *the date of the taking*. *See*

Kirby Forest, 467 U.S. at 17-18. In other words, if a taking award provides a property owner with less then the market value of the property, as measured on the date that the owner is paid for the property (*i.e.* the date of taking), then the award violates the Fifth Amendment. *See id. Kirby Forest* is directly on point and mandates that the Board's valuation of the Line based on a sixteen-month average of steel prices for a period that ended seven months before Toledo was paid for its railroad line should be vacated.

In *Kirby Forest*, a special commission was appointed to determine the fair market value of a petitioner's land that was being taken by the United States Government. *See id.* at 7. The parties stipulated that March 6, 1979 was the "date of the taking." At a subsequent hearing, the commission determined that the fair market value of the land was $2,331,202. *See id.* at 7-8. After two years of legal challenges, on March 26, 1982, the United States deposited the total amount of the judgment with the District Court. *See id.* at 8. This Court granted *certiorari* to resolve a conflict in the Circuits regarding the date on which a taking should be deemed to occur. *See id.*

This Court first determined that a taking occurs at the time an owner receives payment for its property or, in that case, March 26, 1982. *See id.* at 16. The Court then analyzed whether the taking award, which was based on land valuation conducted two years before the date of taking, satisfied the requirements of the Fifth Amendment. The Court held that the award would violate the Fifth Amendment if the property had increased in value from the period of the valuation to the day of the taking because a property owner is "entitled to the fair market value of its property on the date of the taking." *Id.* Thus, as the Court aptly noted:

> However reasonable it may be to designate the date of trial as the date of valuation, if the re-

> sult of that approach is to provide the owner substantially less than the fair market value of his property on the date the United States tenders payment, it violates the Fifth Amendment.

Id. at 17.

The landowner in *Kirby Forest* then suggested that the Court simply require the Government to pay interest for the length of time between the valuation and payment. This Court, however, rejected that approach because a set formula, such as the payment of interest, would not necessarily provide a property owner with the true value of its property at the time of the taking, and could either provide a deficiency or a windfall to the owner. *See id.* at 17. As the Court stated:

> Some parcels appreciate at rates far in excess of the interest rate; others decline in value. Thus, to require the Government to pay interest on the basis proposed by petitioner would only sometimes improve the fit between the value of condemned land on the date of its appropriation and the amount paid to the owner of such land.

Id.

In *Kirby Forest*, this Court remedied the potential constitutional shortfall in the taking award by remanding the case back to the District Court to evaluate whether the land had changed in value from March 6, 1979 (the date of valuation) until March 26, 1982 (the date of the taking). The Court noted that "such a reassessment is both necessary and sufficient to provide petitioner just compensation." *See id.* at 18. *Kirby Forest* mandates that the Board's calculation of the line's NSV was constitutionally deficient in this case.

Here, the Board calculated the "constitutional minimum value" owed to Toledo based on a sixteen-month average of steel prices for the period of November 2003 through July 2004. The beginning period of this range was fifteen months before Toledo's property was taken in February of 2005 and the ending range was seven months before Toledo's property was taken. The Board's use of this averaging method resulted in an award $3 million less than if the Board had calculated the Line's NSV based on the market value of steel on the day it rendered its initial decision. This violates the constitutional principle expressed in *Kirby Forest* that Toledo must receive the fair market value of its line as of the date of taking. *See id.* at 17.

On reconsideration, the Board attempted to justify its use of average steel price, rather than current market prices, on the following basis:

> Commodity prices are more likely to fluctuate widely over a longer period of time, as demonstrated by the record here. It is appropriate when such fluctuations occur to average commodity prices over the length of the proceeding to protect sellers from dramatic price reductions and buyers from dramatic increases.

See February 7, 2005 Decision, 2005 WL 281909 at *10 (Pet. App. 73).

The Board's rationale does not pass constitutional scrutiny. A feeder line proceeding involves the forced taking of property. As such, whether or not the price of steel was volatile, under *Kirby Forest*, Toledo constitutionally was entitled to fair market value at the time of the taking. *See id.* at 17. Put simply, the Board can have no concern for a buyer's protection in a feeder line proceeding when the result of that decision provides a seller with less than the fair market value of its property. *See Washington Metropolitan Area Transit*

Auth. v. One Parcel of Land in Fairfax County, Vermont, 780 F.2d 467, 472 (4th Cir. 1986) ("*WMATA*") (reversing condemnation award which included improvements made after the date of taking). This is especially true considering that, under 49 U.S.C. § 10907, a buyer may walk away from the purchase of a railroad line for any reason at all; even if it simply does not like the price set by the Board. A seller, however, is forced to sell no matter whether it agrees with the Board's price or not. *See* 49 C.F.R. § 1151.2.

The Board's averaging method, for example, would never provide a rail owner in feeder line proceeding with the full value of its line in a continually-increasing steel market. Instead, the owner would be saddled with the average price of its property over the course of the proceeding. Such a precedent violates the Fifth Amendment because an owner is deprived of the market value of its property at the time of the taking. *See Kirby Forest*, 467 U S. at 17. This Court, in fact, rejected the suggestion that a structured formula, such as the payment of interest, would be adequate because such a procedure would not protect a seller in a rapidly-appreciating market. *See id.* The *WMATA* Court also recognized this principle and stated:

> The WMATA's argument that the value of the property should be determined at the time of the right of entry is incorrect. The value of the taken property should be assessed at the time of the taking, in this case on May 31, 1984. WMATA waited until May 31, 1984 to initiate condemnation proceedings, rather than proceeding earlier, and it must, as a consequence, pay for the enhancements and value of the property due to its ongoing construction of the Metro Station in the vicinity of the property. Had the land, in the interim, declined in value, WMATA as condemnor would have reaped an

> advantage from its delay. A converse is true where the delay in deciding to condemn resulted in a value increase.

WMATA, 780 F.2d at 472 (internal citations omitted).

Similarly here, the Board's averaging procedure is not acceptable under the Fifth Amendment because the result of that procedure provided Toledo with substantially less than the market value of its property on the date of the taking. Thus, this case is appropriate for the issuance of the writ to permit the Court to consider a remand of these proceedings to the Board and with directions to determine, and reset, the constitutional minimum value of the Line based on the market value of steel as of the date of the taking (February of 2005).

V. The Board's use of average steel prices was arbitrary and capricious.

In addition to constitutional concerns, an agency's decision will be deemed to be improper where said decision is arbitrary and capricious or when it departs from prior agency precedent without proper explanation. *See Atchison, Topeka & Santa Fe Ry. Co. v. I.C.C.*, 412 U.S. 800, 805-06 (1973) (upholding district court's order vacating and remanding rate decision because the decision departed from prior board precedent). Here, the Board's valuation of the Line's NSV based on a sixteen-month average price of steel, rather than the fair market value of steel at the time of the taking, departed from prior Board precedent and was arbitrary and capricious.

First, the Board in this case failed to follow prior precedent that a line's valuation should be based on current steel prices in order to ensure that a seller is provided with fair market value for its line. *See CSX Transport, Inc.–Abandonment Exception–In Laporte, Porter & Stark Counties, Indiana, Board Docket No. AB-55*, 2004 WL 933330

(S.T.B.) (April 30, 2004) ("*LaPorte*"). *LaPorte* is directly on point. In that case, which involved an abandonment proceeding under 49 U.S.C. § 10904, the railroad submitted a petition on February 20, 2004 that valued its line at $1,050,500. After sale negotiations with the town of North Judson (the "Town") broke down, the Town filed a request, pursuant to 49 U.S.C. § 10904(e), to set terms and conditions for sale of the Line. On April 5, 2004, the railroad submitted a revised petition demonstrating that its line had a value of $2,431,288, an 86% increase over the initial evaluation. *See id.* at * 1-3.

The railroad alleged that the difference was due to a sharp increase in the price of scrap steel during the proceeding two (2) years. Over the Town's objection, the Board allowed evidence regarding the current market value of steel. In so doing, the Board held as follows:

> The Board is generally reluctant to take action that might encourage parties continually to file new evidence as economic conditions change. Here, however, notwithstanding the railroad's failure to properly follow . . . procedures, the Board is bound by 49 U.S.C. § 10904(f)(1)(b) to set a purchase price no lower than the fair market value of the property, which is the constitutional minimum value. Therefore . . . the Board finds that it would be improper to reject the new evidence on scrap steel prices, as doing so could lead to the establishment of a purchase price that is inaccurate and below the constitutional minimum.

Id. at 2 (citations omitted).

LaPorte should have controlled the Board's valuation here. When confronted with *LaPorte*, however, the Board refused to follow that decision, attempting to distinguish that case as follows:

> The *LaPorte* decision . . . involved an offer of financial assistance (OFA), which requires the Board to set terms and conditions within thirty (30) days of the OFA filing date. A feeder line proceeding under a 49 U.S.C. § 10907 involves a less abbreviated schedule. In this case, for example, the application was filed in April 2003 but was not ruled upon until October 2004. Commodity prices are more likely to fluctuate widely over a longer period of time, as demonstrated by the record here. It is appropriate when such fluctuations occur to average commodity prices over the length of the proceeding to protect sellers from dramatic price reductions and buyers from dramatic increases.

See February 7, 2005 Decision, 2005 WL 281909 at *10 (Pet. App. 73).

This rationale is erroneous for several reasons. First, as explained, the Board's purported policy concern of protecting buyers in a volatile market does not pass constitutional scrutiny because it deprives sellers of the fair market value of their property. *See Kirby Forest*, 467 U.S. at 17.[5] Second, the Board's determination that valuations in OFA proceedings are subject to different standards than in feeder line proceedings is inconsistent with well-established prior Board precedent that valuations under feeder line proceedings must employ the *same criteria* as OFA proceedings. *See Sandusky County–*

[5] As explained, buyers are afforded ample protection under 49 C.F.R. § 1151.2 because they have the option to walk away from the transaction if they deem the Board's purchase price to be too high. Therefore, if the price of steel increases to quickly, the buyer simply may decline to accept the Board's decision.

Seneca County-Feeder Line Application, 6 I.C.C.2d 568, 574 1990 WL 287342 (Feb. 9, 1990) ("in our line valuation, we apply the same criteria as for [OFA proceedings]."); *see also Cheney Ry. Co.–Feederline Acquisition–CSX Transportation, Inc. Line Between Greens and Ivalee, AL*, 5 I.C.C.2d 250, 268, 1989 WL 238542 (I.C.C.) (Mar. 1, 1989) ("in valuing this line, we used the same criteria as are used for offers of financial assistance under 49 U.S.C. § 10905 to acquire a rail line to be abandoned"). The Board's failure to abide by this precedent—which mandated that it employ the valuation method employed in *LaPorte*—without explanation, mandates reversal of the Board's decision. *See e.g., Atchison, Topeka & Santa Fe Ry. Co.*, 412 U.S. at 806 (upholding reversal of ICC decision because it departed from prior precedent without explanation).

Finally, the Board's refusal to consider any evidence of steel prices after July 2004 was arbitrary and capricious. The Board rationalized that April 2003 through July 2004 was an appropriate averaging period because the feeder line proceeding was commenced in April 2003, and July 2004 was the last date available for steel information. As to the ending period, the Board's statement simply is not true. The Board did not issue its initial decision until October 28, 2004, and the sale did not close until February 2005. As such, there was ample evidence of steel prices after July 2004 available. Even worse, the Board requested additional information from the parties on steel prices in its October 28, 2004 decision, yet (for some unknown reason) it limited that additional evidence to no later than July 2004. Then, when Toledo *actually submitted* to the Board evidence of steel prices after July 2004, the Board refused to consider that evidence in its February decision.

Examining different averaging scenarios demonstrates that the arbitrary nature of the Board's decision deprived Toledo of the constitutional minimum value of the Line. If,

for example, the Board decided to use steel prices based on a six-month period ending in July 2004, rather than a sixteen month period, the price of scrap steel would have $205 per ton (rather than $158). If the Board had used average prices until January 2005, instead of July 2004, its steel price would have been significantly higher than $158 per ton. Even the initial date of the averaging period was unfair to Toledo. KJRY did not even file a proper application until June of 2003, and the Board specifically struck portions of the initial application filed in April 2003. Using June 2003 as the averaging starting point, the date KJRY first filed a proper application, would have yielded an average steel price of $165 per ton for scrap steel.[6] These differences in steel prices resulted in Toledo receiving significantly less than the market value of its property.[7] These scenarios all show that the Board's use of April 2003 through July 2004 as the period on which to base steel prices was arbitrary and capricious, and deprived Toledo of the fair market value of the Line on the date of the taking. This Court should vacate the Board's valuation award and instruct the Board to determine the constitutional minimum value of the Line based on steel prices as of February 2005, the date of the taking.

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[6]It is patently unfair for Toledo to suffer the consequences of low steel prices during April and May 2003 when KJRY did not even have a valid feeder line application on file during that time.

[7]As previously explained, Toledo does not seek a finding as to the value of Line based on steel prices at the time of the taking. Rather, assuming this Court issues the writ, Toledo will ask this Court to remand this matter to the Board with instructions to determine the value of the Line as of February 2005.

CONCLUSION

For the foregoing reasons, Toledo's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Westlaw.

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462 F.3d 734, Fed. Carr. Cas. P 84,466
(Cite as: 462 F.3d 734)

H

Briefs and Other Related Documents

Toledo, Peoria & Western Ry. v. Surface Transp. Bd.C.A.7,2006.

United States Court of Appeals,Seventh Circuit.

TOLEDO, PEORIA & WESTERN RAILWAY, Petitioner,

v.

SURFACE TRANSPORTATION BOARD and United States of America, Respondents,

andKeokuk Junction Railway Company, Intervenor-Respondent.

No. 05-1920.

Argued Jan. 13, 2006.
Decided Sept. 7, 2006.

Background: Forced seller of rail line filed a petition seeking review of an order of Surface Transportation Board (STB), 2005 WL 281909, which granted feeder line application under the Staggers Rail Act, claiming that the STB erroneously calculated the constitutional minimum value of the line.

Holdings: The Court of Appeals, Ripple, Circuit Judge, held that:

(1) STB's price-averaging methodology for calculating the net salvage value of rail line was not arbitrary or capricious, and

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(2) STB did not err in refusing to consider future tax credits available under American Jobs Creation Acts in calculating the net liquidation value of forced seller's rail line.

Petition denied; affirmed.

West Headnotes

[1] Statutes 361 219(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(1) k. In General. Most Cited Cases

Courts generally defer to agency expertise when interpreting vague or incomplete statutes.

[2] Railroads 320 125.1

320 Railroads
320VII Sales, Leases, Traffic Contracts, and Consolidation
320k125 Sales
320k125.1 k. In General. Most Cited Cases

Surface Transportation Board's price-averaging methodology for calculating the net salvage value of rail line which rail carrier was forced to sell under Staggers Rail Act to feeder line applicant was not arbitrary or capricious; because of

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unpredictable market conditions during the course of the litigation and the unpredictability of the date of final sale, STB reasonably calculated the statutory constitutional minimum value of the line by averaging the price of steel during feeder line proceeding, rather than by using current market prices. 49 U.S.C.A. § 10907(b).

[3] Railroads 320 ⚿125.1

320 Railroads
320VII Sales, Leases, Traffic Contracts, and Consolidation
320k125 Sales
320k125.1 k. In General. Most Cited Cases

Surface Transportation Board (STB) did not err in refusing to consider future tax credits available under American Jobs Creation Acts in calculating the net liquidation value of forced seller's rail line in feeder line proceeding under Staggers Rail Act where, but for the feeder line application, seller would have abandoned rail line, selling its track and rail materials for scrap; tax credits could not be considered in calculating the constitutional minimum value of the line both because tax credits were non-physical assets of the line, and therefore not part of the line's liquidated value, and because the STB found that it was speculative at best whether seller would actually spend the funds necessary to entitle it or its corporate parent to a tax credit. 26 U.S.C.A. § 45G; 49 U.S.C.A. § 10907.

[4] Railroads 320 ⚿125.1

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320 Railroads
320VII Sales, Leases, Traffic Contracts, and Consolidation
320k125 Sales
320k125.1 k. In General. Most Cited Cases

Forced seller's argument that Surface Transportation Board (STB) erred in permitting feeder line applicant to submit a new real estate appraisal along with its reply brief in feeder line proceeding was not preserved for appellate review where seller did not object to applicant's submissions until the STB had issued an unfavorable decision; although seller was not permitted to file a reply to a reply, it could have filed a motion to strike appraisal, or petition the STB to respond to that appraisal. 49 U.S.C.A. § 10907.

[5] Railroads 320 ⚿125.1

320 Railroads
320VII Sales, Leases, Traffic Contracts, and Consolidation
320k125 Sales
320k125.1 k. In General. Most Cited Cases

Because evidence that was reasonably available to the parties before the proceeding was not new evidence requiring Surface Transportation Board (STB) to grant "reconsideration of an action" and because land title analysis raised before the STB the same substance as had and could have been raised earlier, STB did not abuse its discretion in striking land title analysis in feeder line proceeding under Staggers Rail Act. 49 U.S.C.A. § 722.

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462 F.3d 734
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(Cite as: 462 F.3d 734)

***735** J. Timothy Eaton (argued), Shefsky & Froelich, Chicago, IL, for Petitioner.
***736** Raymond A. Atkins (argued), Surface Transportation Board, Office of the General Counsel, John P. Fonte, Robert B. Nicholson, Department of Justice, Washington, DC, for Respondents.
William A. Mullins (argued), Baker & Miller, Washington, DC, for Intervenor.

Before RIPPLE, KANNE and ROVNER, Circuit Judges.
RIPPLE, Circuit Judge.
On April 9, 2003, Keokuk Junction Railway Company ("KJRY") filed with the Surface Transportation Board (the "STB") [FN1] a "feeder line" application under the Staggers Rail Act of 1980, 49 U.S.C. § 10907. [FN2] By this application, KJRY sought a court order mandating the sale of a rail line owned by Toledo, Peoria & Western Railway ("TP&W"). After extensive litigation on the subject, the STB granted this application, having found that KJRY had met the statutory requirements; it set the line's net liquidation value, which is composed of the salvage value of the line's track and other materials plus the value of land owned in fee by TP&W, at $3,940,756. TP&W subsequently filed a petition for reconsideration, which the STB granted in part and denied in part. Specifically, the STB found error in its previous valuation analysis and revised the value of the line upward to $4,165,742.

FN1. Congress abolished the Interstate Commerce

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Commission in 1995 and created in its place the STB. *See* 49 U.S.C. § 702 ("Except as otherwise provided in the ICC Termination Act of 1995, or the amendments made thereby, the [Surface Transportation] Board shall perform all functions that, immediately before January 1, 1996, were functions of the Interstate Commerce Commission[.]"). The STB is an independent agency administratively affiliated with the Department of Transportation; it has an exclusively rail-oriented set of responsibilities.

FN2. Title 49 U.S.C. § 10907 requires the STB to order the sale of a rail line when it has been abandoned or not adequately served by its owner if the buyer is found to be "financially responsible" and various other statutory requirements are met. 49 U.S.C. § 10907(b)(1). Under § 10907(b)(2), the seller is entitled to the "constitutional minimum value" of the rail line, which the statute defines as "not less than the net liquidation value of such line or the going concern value of such line, whichever is greater." *Id.* § 10907(b)(2).

TP&W subsequently filed a petition in this court seeking review of the order of the STB; it contends that the STB erroneously calculated the constitutional minimum value of the line. According to TP&W, the STB should have valued the track and other materials using current market prices of steel rather than a 14-month average. In addition, TP&W submits that the STB should have considered rebuttal

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evidence from TP&W, which called into question the validity of the land-title analysis performed by KJRY's experts. Further, according to TP&W, the STB should have compensated TP&W for the value of tax credits for which it would be eligible over the next three years under the American Jobs Creation Act of 2004, 26 U.S.C. § 45G. For the reasons set forth in the following opinion, we deny TP&W's petition for review.

I

BACKGROUND

A. Facts

For a number of years, TP&W has operated a 76-mile rail line in West Central Illinois, which runs from its junction with KJRY near La Harpe, Illinois, to its junction with Union Pacific Railroad Company at Hollis, Illinois ("La Harpe-Hollis Line" or "line"). In December 2000, TP&W sold its right to operate this line and the majority of its rail materials to SF & L Railway, *737 Inc. ("SF & L") for approximately $2.18 million. The sale was challenged and, finding that SF & L's purpose was to abandon and salvage the line, the STB revoked SF & L's authority to acquire the line and directed that TP&W retake possession. *See SF & L Railway, Inc.-Acquisition & Operation Exemption-Toledo, Peoria & W.*

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Railway Corp. Between La Harpe & Peoria, Illinois. STB Finance Docket No. 33996 (Oct. 15, 2002).

Subsequently, on April 9, 2003, KJRY filed a "feeder line" application under 49 U.S.C. § 10907 seeking the forced sale of the line. KJRY claimed in its application that TP&W "clearly and persistently refused to make the necessary efforts to provide adequate service to shippers who transport traffic on the Line," A.R. 207572 at 22, and that KJRY's purchase of the line would improve significantly service on the line, *see id.* at 26-27. It offered to purchase the line with or without the Mapleton Spur, a 2.5-mile connecting segment of the line at Milepost 123 that runs through an industrial park. The application calculated the constitutional minimum value of the line according to its net liquidation value ("NLV"), which is defined by its net salvage value ("NSV") plus its land value. *See* 49 U.S.C. § 10907(b)(2). KJRY estimated the NLV of the line to be $3,393,363, a sum comprised of $3,283,504 for TP&W's track and other materials and $109,859 for its real estate. With regard to salvage value, KJRY relied on the description of TP&W's assets prepared by TP&W in a previous effort to sell the western segment of the line, applied current market prices and subtracted the estimated cost of removal. With regard to land valuation, KJRY noted in its application that it lacked information about TP&W's real estate holdings necessary to perform an accurate land valuation. According to KJRY, it had filed discovery requests for copies of TP&W's deeds, valuation maps and real estate records; TP&W refused these requests, contending that the documents were publicly available. In the absence of this

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information, KJRY estimated the value of TP&W's land at $100,000, premised on the assumption that TP&W held marketable title to 50% of the right-of-way-a total of 864 acres-and that its parent company, RailAmerica, owned in fee the remainder of the land.[FN3]

> FN3. KJRY did not calculate in its April 2003 application the going concern value ("GCV") of the line. It submitted that the only portion of the line profitable to TP&W was the Mapleton Spur, and that, because KJRY had offered "TP&W the opportunity to retain the economic benefit of operating the Mapleton Segment" by "according TP&W trackage rights" over that portion of line, TP&W would continue to earn profit from the Spur and therefore should not be compensated for any economic benefit derived from its current operation. A.R. 207572 at 16.

KJRY's April 2003 application was found to be deficient by the STB. *See* *Keokuk Junction Railway Co.-Feeder Line Acquisition-Line of Toledo, Peoria & W. Railway Corp. Between La Harpe & Hollis, Ill.*, STB Docket 34335, 2003 WL 21043073 (May 9, 2003). In pertinent part, the STB rejected KJRY's claim that the line did not have a going concern value ("GCV"); it found that, because the Mapleton Spur has the ability to continue to earn profit, requiring the sale of this portion of the line to KJRY mandated compensation for income earned from its operation. *Id.* at *3 (holding that KJRY's offer to accord TP&W trackage rights

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over the Spur "is neither the equivalent of, nor a reasonable substitute for, an actual GCV estimate").[FN4] ***738** The STB offered KJRY an opportunity to perform a GCV estimate and file it with the STB along with supporting data. Accordingly, KJRY amended its application on June 9, 2003; it calculated the GCV of the line, assuming exclusive service over the Spur by KJRY, to be $3,461,434. To arrive at this sum, KJRY used TP&W's operating data from 1998-the most recent data available to KJRY-which showed that TP&W earned appropriately $1,412,830 in shipments moving to and from the Mapleton Spur. KJRY subtracted from this number estimated operating expenses of $1,059,623, yielding an annual income from the Spur of $353,208. This in turn produced a GCV of $3,461,434. *See* A.R. 208011.

> FN4. The STB also requested from KJRY "additional evidence of financial responsibility to purchase and operate the entire line, and more detailed operating plans and *pro forma* financial statements." *Keokuk Junction Railway Co.-Feeder Line Acquisition-Line of Toledo, Peoria & W. Railway Corp. Between La Harpe & Hollis, Ill.*, STB Docket 34335, 2003 WL 21043073, at *4 (May 9, 2003). The KJRY amended its application to include these materials on June 9, 2003. *See* A.R. 208011 at 21-23.

Alternatively, KJRY proposed the following: "KJRY will purchase all of the Line, except the Mapleton Spur, and then allow TP&W to retain sole access at the Mapleton Spur....

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KJRY will grant TP&W access over the Line between Hollis and the Mapleton Spur at no trackage rights charge[.]" *Id.* at 20. Under this scenario, according to KJRY, TP&W would be entitled to the NLV of the line not including the Spur, which it calculated as $3,284,605 (the Spur is the only portion of the line with a GCV).[FN5]

> FN5. On July 9, 2003, the STB accepted KJRY's application for filing, subject to compliance with environmental reporting requirements.

TP&W filed its response to KJRY's application on October 16, 2003. In pertinent part, TP&W challenged KJRY's calculations of the line's constitutional minimum value. TP&W urged the STB to treat the eastern and western portions of the line as "two easily severable properties," "apply[ing] the NLV to the Western End and the GCV to the Eastern End, which includes the Mapleton Spur." A.R. 209135 at 39. Under this approach, according to TP&W, the line should be valued at $6,854,797. In the alternative, assuming that it would be compensated only for its liquid assets-track, materials and real estate-TP&W submitted that KJRY erred in calculating the salvage value of the track and materials because it relied upon "five-year old track charts." *Id.* at 41. TP&W's expert, Mark Garvin, instead based his analysis on recent records of TP&W's assets, dividing the materials into three categories: relay steel; reroll steel; and scrap. *Id.*, Ex.E. He then compared the quantities of each with current market prices and subtracted removal costs. He

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calculated the western portion of the line's NSV to be $4,410,920. According to TP&W, KJRY also erred in valuing TP&W's real estate. TP&W presented the real estate analysis of Todd Cecil, its Vice President of Real Estate, who estimated that TP&W owned 672 acres of land. *Id.*, Ex.F. Cecil valued this land as an "assembled corridor," assuming that the property would be purchased for use as a rail line: He divided the land into parcels for the purpose of comparing them to the price of sale for similarly-sized properties in the area, and then added an "[e]nhancement [f]actor" to reflect the value of the land as a "ready-made, assembled corridor" to the purchaser. *Id.* at 113. In all, Cecil estimated that TP&W's real estate was worth $7,009,497. This produced an NLV of $9,218,759.

KJRY filed a reply to TP&W's response on November 7, 2003, in which it withdrew its offer to purchase the Mapleton Spur. *See* A.R. 209359 at 5 ("KJRY remains willing***739** to purchase just the line, from Hollis to La[ ]Harpe, without the Mapleton Spur, and to grant TP&W access from Hollis ... to the point of connection with the Mapleton Spur without a trackage rights charge so that TP&W could continue to serve the shippers on the Mapleton Spur."). With its reply, KJRY also included the real estate analysis of Brian D. Mooty. [FN6] Mooty analyzed approximately 200 deeds to determine the "type of ownership interest conveyed based on the language contained in each of the deeds." *See id.*, Ex.10 at 1. He concluded, on the basis of this language, that TP&W owned 31.657 acres in fee [FN7] and that the remainder of the deeds did not convey to TP&W marketable title but rather only an

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easement over the land. *See also id.*, Ex.10 at 3 (noting, for example, that some of the deeds contained the qualifying language, "occupied and used by the Railway," and that TP&W's interest in this type of land ceases when the "easement ownership interest ceases" (internal quotation marks omitted)); *see also id.*, Ex.10-A.

> FN6. KJRY noted in its reply that, prior to the filing of TP&W's response, it had no access to relevant documents, including TP&W's deeds; only after receiving copies of these documents, which were attached to Cecil's real estate analysis, could it hire an attorney to analyze their language and to provide a comprehensive assessment of TP&W's real estate interests.

> FN7. KJRY took issue with a portion of Mooty's analysis. Specifically, on the basis of a second real estate appraisal authored by its general counsel, KJRY urged the STB to find that TP&W owned only 28.24 acres of marketable property, instead of the 31.657 acres proposed by Mooty. The STB rejected this suggestion.

KJRY also presented with its reply the valuation analysis of independent Illinois-certified real estate appraiser L. Arlen Higgs. *See id.*, Ex.11. Higgs estimated that the 28.24 acres of land allegedly owned in fee by TP&W were worth a total of $37,140. According to KJRY, TP&W's expert,

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improperly valued the land as a "corridor, rather than as individual parcels," contrary to STB precedent; this added "20% to 40% to the value of the right of way on the supposition that the property has value as a rail corridor." A.R. 209359 at 45. By contrast, Higgs compared the land to the sale of "abandoned rail right [s] of way" in Illinois, the type of property he claimed to be most similar to TP&W's rail line. *Id.* at 52-53 (noting that this type of land typically is sold at a "51% to 84% discount from the value of adjacent property ... [because of] the size, shape and limited number of potential buyers"). Averaging the price of sale of six comparable properties over a fifteen-year period, Higgs projected a value of $1,568 per acre.[FN8] In all, KJRY proposed that the "line (without the Mapleton Spur) has a NLV of $3,321,745." *Id.*, Ex.11 at 9.

> FN8. KJRY also challenged in its reply brief the valuation of track and other rail materials performed by TP&W's expert. "By using costs at which it purchases materials for comparison, rather than costs at which materials are sold," KJRY submitted, "Mr. Garvin gives his valuation a 15% to 30% boost. Ordinarily, purchasers of rail materials must allow a 15% to 30% margin to cover expenses such as materials handling, inventory carrying, and profit." A.R. 209359 at 41 (also noting that Garvin improperly treated grade crossing facilities and bridges as salvageable material and understated the cost of removal). Instead, KJRY urged the STB to value the

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track and materials at "wholesale" prices. *Id.*, Ex.8 at 2.

TP&W filed no counter-response to KJRY's reply, although it supplemented the record in March 2004, and again in November 2004, with evidence that market prices of steel had increased, thus increasing the line's net salvage value.

***740 B. STB Proceedings**

1. October 2004 Decision

The STB granted KJRY's feeder line application on October 28, 2004. It found that KJRY had demonstrated that sale was proper under 49 U.S.C. § 10907(c)(1). Section 10907(c)(1) sets forth five conditions that must be fulfilled for forced sale of a rail line to be appropriate:

(A) [That] the rail carrier operating such line refuses within a reasonable time to make the necessary efforts to provide adequate service to shippers who transport traffic over such line;

(B) [That] the transportation over such line is inadequate for the majority of shippers who transport traffic over such line;

(C) [That] the sale of such line will not have a significantly adverse financial effect on the rail carrier operating such line;

(D) [That] the sale of such line will not have an adverse effect on the overall operational performance of the rail carrier operating such line; and

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(E) [That] the sale of such line will be likely to result in improved railroad transportation for shippers that transport traffic over such line.

49 U.S.C. § 10907(c)(1).

The STB found that "KJRY ha[d] satisfied each of the five statutory criteria." Petitioner's App., Ex.A at 10. Specifically, it determined that TP&W had refused to provide adequate service over the line "since February 10, 2003, when it reacquired the La Harpe Line pursuant to [the STB's] order." *Id.* at 4. Contrary to TP&W's claim that it was ready and able to provide such service but had not received service requests, the STB found that TP&W had "actively discouraged use of the [l]ine" by, among other things, refusing to provide rate quotes to shippers who wanted to move over the line and setting shipping rates prohibitively high. *Id.* at 5 (summarizing the experiences of shippers seeking to move over TP&W's line); *see also* 49 U.S.C. § 10907(c)(1)(A). The STB next found that, as a result of these practices, transportation over the line was "inadequate" and that its sale would improve "rail transportation for shippers." Petitioner's App., Ex.A at 7, 9-10; *see also* 49 U.S.C. § 10907(c)(1)(B), (E). It rejected the claim that forced sale would have a negative material effect on TP&W's finances or its operations. *See* Petitioner's App., Ex.A at 7-8 (noting that TP&W would continue to operate the only profitable portion of the line-the Mapleton Spur-and that TP&W had not provided service over the line for so long that it was unreasonable to suggest that the "[l]ine's sale could

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have a significant adverse operational effect on TP&W"); *see also* 49 U.S.C. § 10907(c)(1)(C)-(D). Lastly, the STB found that KJRY was "financially responsible" and could cover line expenses for at least three years. Petitioner's App., Ex.A at 20-23; *see also* 49 U.S.C. § 10907(c)(1)(D).[FN9]

> FN9. The STB's findings on these matters have not been challenged by TP&W on appeal.

The STB then calculated the constitutional minimum value of the rail line. *See* 49 U.S.C. § 10907(b)(2) (defining constitutional minimum value as "not less than the net liquidation value of such line or the going concern value of such line, whichever is greater"). KJRY and TP&W agreed that the line's constitutional minimum value should be defined by its net liquidation value, or NLV. Because TP&W would retain ownership of the Mapleton Spur and because KJRY had agreed to provide TP&W with cost-free trackage rights over portions of the line, the part of the line ***741** being acquired by KJRY did not have a GCV.

The STB determined that the NLV of the line was $3,940,756. As mentioned previously, NLV is comprised of two calculations: the net salvage value of the rail, ties and other track materials; and the value of the land. The STB began with salvage value, which consists of the total value of the materials minus the cost of removal. The STB accepted in large part TP&W's calculations, which utilized "current track charts, recent price quotes, and a physical inspection of

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the [l]ine"; it contrasted these calculations with KJRY's valuation, which was "based on older data, averages, and estimates." Petitioner's App., Ex.A at 14. According to the STB, the western segment of TP&W's rail line contains 77.46 miles of rail and the eastern segment contains 4.5 miles of rail.

The STB, however, rejected both parties' valuation of this material. In their initial applications, the parties differed widely in their estimates of the current price of relay, reroll and scrap metals. Further, after the record had closed, both parties attempted to submit revised valuations: TP&W asserted that the price of steel had increased significantly since October 2003; KJRY responded that prices had dropped. The STB concluded that the parties' divergent positions demonstrated the "recent volatility in the scrap iron and steel and reroll markets." *Id.* at 14. In light of "the time that ha[d] elapsed since this case was filed," the STB held, "it would not be appropriate to select a single date for the purpose of pegging a price for these commodities." *Id.* Instead, citing a number of cases in which it had averaged prices over multiple months in the course of valuing a rail line, the STB "average[d] the price of scrap over the time period involved," beginning in April 2003, the date that KJRY's feeder line application first was filed, and concluding in July 2004, the last month of available data.[FN10] The STB accepted TP&W's estimate of removal costs and set the total NSV at $3,899,121.

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> FN10. The STB did the same for the price of reroll steel, but it based its calculations on the unit values submitted by TP&W in its original valuation charts. It provided TP&W with 30 days to supplement the record with monthly composite average unit prices of reroll.

The STB then turned to land value. It adopted the recommendations of KJRY on the question of acreage owned by TP&W. Mooty, according to the Board, is well-qualified in Illinois real estate law; Cecil, by comparison, is not even an Illinois attorney. Further, while Cecil merely estimated that TP&W owned approximately half of the land and that its parent company, RailAmerica, owned the other half, Mooty carefully examined the language of over 200 deeds in the course of concluding that TP&W owned only 31.657 acres in fee and that the remainder of the deeds merely granted TP&W an easement over the land. The STB concurred with Mooty that the "cited language in those deeds" compelled the finding that TP&W owned 31.657 acres of land. *Id.* at 20.

The STB valued this land using KJRY's estimates as well. It held that Cecil's continuous-corridor analysis 1) improperly sought "to combine into an NLV analysis both the NLV and GCV methodologies," 2) was contrary to "the statutory distinction between the two methodologies," and 3) was inconsistent with "court precedent." *Id.* at 18 (also finding that the continuous corridor approach unfairly "inflat[ed] the value of [the] properties"). The STB instead adopted Higgs' valuation analysis, finding "more appropriate" his comparison

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to "six sales of abandoned rail rights-of-way in Illinois over the past 15 years." *Id.* at 20. The STB valued the 31.657 acres owned in fee by TP&W at $41,635, resulting*742 in a NLV of $3,940,756. The parties were given 90 days to close the sale of the rail line.

2. February 2005 Decision

On November 29, 2004, TP&W filed a petition to reconsider the STB's prior decision.[FN11] In pertinent part, TP&W contended that: (1) the STB erred in accepting and relying on Mooty's real estate analysis because it was not timely submitted in KJRY's opening brief, therefore depriving TP&W of "an opportunity to reply to that evidence," A.R. 212639 at 13; (2) the STB erred in preferring Higgs' land valuation analysis over Cecil's estimates; (3) the STB "failed to follow its own precedent" in averaging the price of steel rather than valuing the steel at its market price as of November 1, 2004, *id.* at 17; and (4) new legislation, the American Jobs Creation Act of 2004, 26 U.S.C. § 45G, entitled TP&W to compensation for certain tax credits.[FN12] TP&W's petition for reconsideration was accompanied by a new real estate analysis, which was authored by Jeffrey Gray and Scott Borstein of Wildman, Harrold, Allen & Dixon, LLP. Gray and Borstein, TP&W claimed, critiqued Mooty's methodology and conclusions and therefore their analysis would help the STB in "fulfill[ing] its mandate of determining the NLV of the [l]ine." A.R. 212639 at 14. KJRY subsequently filed a motion to strike this evidence,

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contending that Gray and Borstein had not relied on " 'new' evidence that was unavailable at the time that TP&W filed its Comments on October 16, 2003." A.R. 212694 at 4.

> FN11. On this same date, TP&W filed supplemental data on monthly composite average steel prices, as requested by the STB.
>
> FN12. TP&W also submitted that, since October 2004, "a new shipper on the Canton to Hollis line" had emerged, "generat[ing] a going concern value" for that portion of the line. A.R. 212639 at 10; *see also id.* at 11 (urging that this "new traffic is now part of the value of the Canton-Hollis line"). The STB found that TP&W's allegations were unsupported by the record: The shipper had filed with the STB a verified statement that contradicted TP&W's version of events. Specifically, the STB noted that various issues remained unresolved between the shipper and TP&W, "making any potential agreement speculative." Petitioner's App., Ex.B at 11. The STB therefore reaffirmed its prior conclusion that the Canton-Hollis segment of the line had no going concern value. This conclusion has not been challenged on appeal.

TP&W's motion for reconsideration was granted in part and denied in part in a decision dated February 7, 2005. In pertinent part, the STB granted KJRY's motion to strike Gray and Borstein's land title analysis because it did not rely upon

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"newly available evidence" but instead was "based entirely on evidence that was available at the time TP&W filed its Comments":

TP&W seeks to rely upon an entirely new valuation, submitted for the first time in its petition for reconsideration. TP&W's attempt to submit an entirely new land title analysis that would relitigate its ownership of the underlying real estate is inappropriate here, as TP&W could have submitted this evidence much earlier.

Petitioner's App., Ex.B at 5.

The STB took note of TP&W's argument that the "burden of proof is on the applicant to establish, in its case-in-chief, the value of the rail line, including its real estate," and that KJRY's land valuation was not presented until rebuttal. *Id.* at 4. The STB found, however, that TP&W was not deprived of an opportunity to respond to Mooty's valuation of the land: It "would have permitted TP&W to respond [by way of a reply to the reply]." *Id.* at 5. Further, the STB held, TP&W's objection to the admission of Mooty's real estate ***743** analysis was not preserved adequately. TP&W, the STB explained, "waited more than a year" to address Mooty's analysis, even though it could have petitioned the STB to file a reply to the reply or to supplement the record with a new land valuation before a final decision was issued. *Id.* Accordingly, the STB granted KJRY's motion to strike Gray and Borstein's valuation and the accompanying verified statements, as well as the portions of TP&W's legal argument relating to those documents.

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Turning to TP&W's contention that use of a monthly composite average to calculate net salvage value was inappropriate, the STB held that when litigation is lengthy, as here, "[c]ommodity prices are ... likely to fluctuate widely." *Id.* at 12. "It is appropriate when such fluctuations occur," the STB concluded, "to average commodity prices over the length of the proceeding to protect sellers from dramatic price reductions and buyers from dramatic price increases." *Id.*

Nevertheless, the STB adjusted the purchase price upward, finding the price of reroll steel to be higher than previously calculated. In its October 2004 decision, the STB had afforded TP&W an opportunity to supplement the record with monthly composite data on unit prices of reroll steel; TP&W availed itself of this opportunity. The STB found this evidence to be unreliable [FN13] and instead chose to rely upon data submitted by KJRY. According to this data, reroll steel was worth $175.04 per ton, increasing the line's NSV by $127,828 and yielding a total NSV of $4,026,948.

> FN13. Specifically, according to the STB, the evidence submitted by TP&W covered "only the last 2 months of the 14-month period requested, and the data for one of those months (April 2004) are incorrect." Petitioner's App., Ex.B at 12. The STB further noted that TP&W's data was not "structured as a composite monthly average." *Id.*

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In addition, the STB found that it erred in preferring Higgs' appraisal methodology over the methodology employed by Cecil in valuing the land owned by TP&W. The STB agreed with TP&W that Higgs' comparison of the rail line to six abandoned properties sold over fifteen years was not sufficiently representative: six properties was too few, fifteen years was too long, and the parcels were too far from TP&W's property to reflect adequately the value of TP&W's line. By contrast, the STB found Cecil's appraisal to be "more consistent with precedent and more credible than KJRY's analysis." *Id.* at 12. It therefore recalculated the value of the 31.657 acres owned in fee by TP&W [FN14] using Cecil's per-acre valuation of $4,384.29.[FN15] This per-acre price resulted in a total land value of $138,794 and a NLV of $4,165,742.

> FN14. As already discussed, although accepting Cecil's per-acreage valuation, the STB did not accept Cecil's analysis of the land owned in fee by TP&W. Cecil had suggested that TP&W owned 672 acres; the STB instead found that TP&W owned only 31.657 acres in fee. *See supra* at 7, 13.
>
> FN15. Cecil originally valued the land using a 3-year sell-off period for 95% of the land. The STB slightly adjusted Cecil's valuation to reflect a 4-year sell-off period for all of the land.

The STB last considered TP&W's contention that it was entitled to compensation for tax credits under the American

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Jobs Creation Act, 26 U.S.C. § 45G, for planned future investment in maintaining the rail line. TP&W claimed that it planned to make $1,981,000 in qualified investments yearly, and, with regard to the La Harpe-Hollis line, would be eligible for a tax credit of $291,550 in 2005, 2006 and 2007, totaling $874,650 for the three-year period. The STB, however, held that the NLV of a rail line-the methodology that the parties had agreed should be used ***744** to value TP&W's line-includes only "physical assets of a line," excluding non-physical benefits of ownership such as tax credits. Petitioner's App., Ex.B at 13 (noting that tax credits do not "add value to assets that are being liquidated"). "[T]ax credits more likely would be a consideration in calculating GCV." *Id.* Even if this were not the case, the STB continued, TP&W had failed to demonstrate that it would qualify for the tax credits under 26 U.S.C. § 45G. To receive maximum credit under the statute, to which TP&W claimed it was entitled, TP&W would have to invest $7,000 per mile on a system-wide basis, totaling $1,749,300 in qualified investments over the course of three years. Given that TP&W already had permitted the line to fall into disrepair, the STB concluded that it was "speculative at best ... whether TP&W would actually spend the funds necessary." *Id.*

TP&W timely filed a petition for judicial review of the STB's decision, naming the United States and the STB as defendants. *See* 28 U.S.C. § § 2321(a) & 2342(5). On April 27, 2005, KJRY motioned to intervene as of right; the motion was granted by this court on May 2, 2005.

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II

DISCUSSION

TP&W challenges the STB's decision on three grounds. First, it contests the STB's methodology in valuing the rail line's net salvage value; it contends that, instead of applying a monthly average, the STB should have valued the salvage material at current market prices. Second, TP&W submits that the STB erroneously permitted KJRY to submit Mooty's real estate appraisal with its reply brief; even if this valuation was properly submitted to the STB, TP&W continues, the STB should have afforded TP&W an opportunity to respond to this new evidence and to submit the updated land valuation analysis performed by Gray and Borstein. Third, TP&W challenges the STB's determination that tax credits should not be taken into account in calculating a rail line's NLV. We address each claim in turn.

A. Valuation of Scrap Steel

TP&W first contends that the STB's methodology in pricing its scrap steel is contrary to the general rule that a property owner is entitled to the "fair market value of its property as of *the date of the taking.*" Petitioner's Br. at 22 (emphasis in original). Because the STB's methodology departs from "prior agency precedent without proper explanation," TP&W

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urges us to find the STB's valuation of the line "arbitrary and capricious." *Id.* at 26. [FN16]

FN16. TP&W also contends in its brief on appeal that the STB's valuation of the scrap steel violates the Fifth Amendment's guarantee that an owner receive just compensation for its property. *See* Petitioner's Br. at 22. However, after careful review of the record, we believe that TP&W has waived this argument. In its petition for reconsideration, TP&W contended that the STB's decision to "average the price of scrap steel over a time period" was contrary to agency precedent, including the STB's decision in *LaPorte Abandonment*. A.R. 212639 at 17. Specifically, TP&W claimed that the STB previously only has averaged prices where the value of scrap metal "had been falling," which did not occur in this case. *Id.* Because TP&W did not raise a Fifth Amendment challenge to the STB's valuation methodology in agency proceedings, we decline to address this dimension of their argument on appeal. *See Ester v. Principi*, 250 F.3d 1068, 1072 (7th Cir.2001) (holding that arguments "not made before the administrative agency are subsequently waived before the courts" (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37, 73 S.Ct. 67, 97 L.Ed. 54 (1952))).

[1] We afford substantial deference to the STB's interpretation of the statutes ***745** and regulations it administers, including

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49 U.S.C. § 10907. Although section 10907(c)(1) explicitly sets forth a number of prerequisites to approval of the sale of a rail line, the statute largely is silent with respect to valuation: section (b)(2) specifies that the constitutional minimum value of a line is "not less than the net liquidation value of such line or the going concern value of such line, whichever is greater," *id.* § 10907(b)(2), but it does not speak to what constitutes, or the factors that affect, the calculation of the line's going concern or net liquidation value. "When a statute is found to be either silent or ambiguous, the court must uphold the agency's interpretation if it is based on a 'permissible construction of the statute.' Courts generally defer to agency expertise when interpreting vague or incomplete statutes." *Johnson v. Apfel*, 191 F.3d 770, 774 (7th Cir.1999) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

As a result, our review of the STB's valuation of a rail line's constitutional minimum value is narrow. *See* *Decatur County Comm'rs v. Surface Transp. Bd.*, 308 F.3d 710, 714 (7th Cir.2002). We "give considerable weight and due deference to the [STB's] interpretation of [49 U.S.C. § 10907(b)] unless its statutory construction is plainly unreasonable." *R.R. Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523, 548 (6th Cir.2002) (internal quotation marks omitted; first alteration in original); *see also* *Decatur County Comm'rs*, 308 F.3d at 714. Moreover, we shall not set aside the STB's factual findings unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in

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accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction[;] ... or unsupported by substantial evidence ...." 5 U.S.C. § 706(2)(A)-(E); *see also Caddo Antoine & Little Missouri R.R. Co. v. United States*, 95 F.3d 740, 746 (8th Cir.1996) (holding that, to overturn the STB's valuation of a rail line, there must be "compelling indications that the [STB's] interpretation is incorrect"); *Missouri Pac. R.R. Co. v. I.C.C.*, 23 F.3d 531, 533 (D.C.Cir.1994) ("The court has only limited scope to review the substantive validity of the [STB's] decision: we must affirm unless that decision is arbitrary and capricious, exceeds the [STB's] authority, or diverges without explanation from agency precedent." (internal quotation marks omitted)); *R.R. Ventures*, 299 F.3d at 558 (noting that this standard of review "generally requires affirmance of the STB's valuation decisions"). "A decision is not arbitrary or capricious when it is possible to offer a reasoned, evidence-based explanation for a particular outcome." *R.R. Ventures*, 299 F.3d at 548; *see Highway J Citizens Group v. Mineta*, 349 F.3d 938, 953 (7th Cir.2003) (holding that, "[i]f an agency considers the proper factors and makes a factual determination" that a particular result is compelled, "that decision implicates substantial agency expertise and is entitled to deference"). [FN17]

FN17. *See also Borough of Columbia v. Surface Transp. Bd.*, 342 F.3d 222, 235 (3d Cir.2003) (in evaluating petitioner's Fifth Amendment claim, deferring to the STB's determination and noting that it

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is "loath to second-guess the factual determinations of the agency to which Congress has assigned decision-making responsibility"); *GS Roofing Prods. Co. v. Surface Transp. Bd.*, 262 F.3d 767, 774 (8th Cir.2001) (in the context of reviewing the calculation of constitutional minimum value under § 10907, noting that the "scope of review ... is narrow" and that courts "are required to give considerable deference to the Board's interpretation" and "will not disturb the Board's decision absent compelling indications that the Board's interpretations were incorrect"); *Iowa Terminal R.R. Co. v. I.C.C.*, 853 F.2d 965, 969-71 (D.C.Cir.1988) (reviewing the Board's valuation order to determine whether it was "arbitrary or capricious"). TP&W's only argument to the contrary-that we review all allegations of constitutional error by the STB de novo-is inapplicable; any constitutional error was not adequately preserved by TP&W for appeal. *See supra* n. 16.

***746** [2] In this case, the methodology employed by the STB in calculating the net salvage value of TP&W's rail line was reasonable, and not arbitrary or capricious or otherwise not in accordance with the law. The STB found that prices for steel had been extremely volatile over the course of the proceedings. Consequently, it concluded that calculating the statutory constitutional minimum value of the line by averaging the price of steel from April 2003 to July 2004, as opposed to applying the market price of steel on the date of final sale, more accurately reflected the line's probable value

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on the open market than did the artificially inflated market price of steel as of November 1, 2004. That decision was justified by the STB's careful consideration of a number of factors, most notably the widely-fluctuating price of steel.[FN18] The evidence submitted by the parties prior to the STB's final decision indicates that the steel market was unstable while STB proceedings were ongoing, marked by significant price shifts within short periods of time. *See* TP&W's Petition for Reconsideration, A.R. 212639, Ex.E (setting forth the market value of scrap and reroll steel over the course of seven months, from April to November 2004); KJRY's Reply to TP&W's Reroll Value Evidence, A.R. 212724; *see also id.*, Ex.1. Our role is not to reweigh this evidence, but to determine whether the STB's conclusions regarding market fluctuation are supported by substantial evidence.[FN19] The STB's conclusion finds such support in the revised valuations submitted by the parties after the record had closed and in the updated data submitted by the parties with respect to the petition for reconsideration. *See* *Howard Young Med. Ctr., Inc. v. Shalala*, 207 F.3d 437, 441 (7th Cir.2000) ("We are not permitted to reweigh the evidence or to substitute our own judgment for that of the administrative agency."); *see also* *W. Coal Traffic League v. Surface Transp. Bd.*, 169 F.3d 775, 780-81 (D.C.Cir.1999) (upholding the STB's determination even when "evidence to the contrary" was "substantial" because "evidence supporting the Board's conclusion [also was] substantial").

FN18. TP&W has not challenged the STB's findings

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on the volatility of steel prices.

FN19. This is especially true given that the statute and regulations do not require the valuation of track materials at the market price as of the date of taking or sale. *Cf. Howard Young Med. Ctr., Inc. v. Shalala,* 207 F.3d 437, 442 (7th Cir.2000) (holding that, because the Secretary of Health and Human Services was not required by statute or regulation to interpret the data submitted in a particular fashion, it was appropriate to defer to the agency's interpretation of that data).

We take note of TP&W's argument that *Kirby Forest Industries, Inc. v. United States,* 467 U.S. 1, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984), requires valuation of property "at the time of the taking," *id.* at 10, 104 S.Ct. 2187, which, in turn, was defined by the Court as the date of "payment of the condemnation award," *id.* at 14, 104 S.Ct. 2187; *see also* Petitioner's Br. at 22-24. In *Kirby Forest,* the Supreme Court addressed when a taking of property by use of the "straight-condemnation" procedure provided in 40 U.S.C. § 257 "should be deemed to occur" for purposes of valuing the land. *Kirby Forest,* 467 U.S. at 9, 104 S.Ct. 2187. Just compensation, the Supreme Court held, "means in most cases the fair market value of the ***747** property on the date it is appropriated." *Id.* at 10, 104 S.Ct. 2187. In the context of straight-condemnation proceedings, it concluded, the date on which the property is appropriated is the date on which "the United States tenders payment to the owner of the land." *Id.*

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at 11, 104 S.Ct. 2187.

Relying on this analysis, TP&W contends that the date of taking in this case was on or about February 7, 2005, and that the STB was required to calculate the value of the line according to market conditions on that date. TP&W, however, did not cite *Kirby Forest* before the STB and, in fact, urged the STB to calculate the market price of steel as of November 1, 2004, the date of the STB's valuation decision, not as of February 7, 2005, the date that the sale of TP&W's line to KJRY became final. *See* Petition for Reconsideration, A.R. 212639 at 18 (urging the STB to value the track and materials at market value "as of November 1, 2004, the date nearest the service of the [STB's October decision] and the date on which Mr. [G]arvin would voluntarily sell the scrap steel"). TP&W therefore has waived this argument. *See Ester v. Principi*, 250 F.3d 1068, 1072 (7th Cir.2001) (holding that arguments "not made before the administrative agency are subsequently waived before the courts" (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37, 73 S.Ct. 67, 97 L.Ed. 54 (1952))).

Even if we were to reach the merits of TP&W's argument, we would find it lacking. *Kirby Forest* involved a factual scenario that is not analogous to the present case. The Supreme Court went to great lengths to distinguish the facts presented in *Kirby Forest* from similar scenarios unaffected by its holding; it even noted that "[n]one of the discussion in this opinion is intended to modify either the manner in which the fair-market-value standard is interpreted and applied or

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the test for determining when the fair-market-value standard must be supplanted by other formulae." *Kirby Forest*, 467 U.S. at 10 n. 15, 104 S.Ct. 2187. Specifically, it recognized that there are two scenarios in which "[j]ust compensation" does not mean "the fair market value of the property on the date it is appropriated." *Id.* at 10, 104 S.Ct. 2187 (internal quotation marks omitted). "Other measures of 'just compensation,' " the Court explained, "are employed ... when market value [is] too difficult to find, or when its application would result in a manifest injustice to owner or public." *Id.* at 10 n. 14, 104 S.Ct. 2187 (internal quotation marks omitted; second alteration in original). Although the STB did not address *Kirby Forest* specifically, its rationale mirrors the Supreme Court's analysis: In effect, the STB determined that, in this case, market value was too difficult to ascertain and price-averaging would be more fair to the parties. Specifically, the STB reasonably determined that, because of unusual market volatility, a traditional just compensation model was not appropriate. Market fluctuation over the course of proceedings made it "too difficult" to pinpoint the fair market value of TP&W's materials. *Id.* Moreover, the inflated prices of steel on the date of final sale and on the date of appropriation meant that market value on those dates, according to the STB, did not represent the fair market value of TP&W's assets and would result in "manifest injustice" to the purchaser, KJRY. *Id.* The price of steel almost had doubled between April 2003, the date that the feeder line application was filed, and November 2004, the date of final decision; the STB therefore determined that it was appropriate to supplant the fair-market standard with another

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formula, one that averaged steel prices over a fourteen-month period. *See* Petitioner's App., Ex.B at 12 (holding that ***748** price-averaging "protect[s] sellers from dramatic price reductions and buyers from dramatic price increases"). Given the STB's careful consideration of the matter of just compensation, we cannot agree that the Supreme Court's decision in *Kirby Forest* renders the STB's methodology in this case arbitrary and capricious.

TP&W also submits that the STB's methodology is inconsistent with agency precedent. *See, e.g., CSX Transport, Inc.-Abandonment Exception-In LaPorte, Porter & Starke Counties, Indiana,* STB Docket No. AB-55, 2004 WL 933330 (April 30, 2004) (hereinafter "*LaPorte* "). In *LaPorte,* the Town of North Judson ("Town") submitted an offer of financial assistance ("OFA"), *see* 49 U.S.C. § 10904, to purchase a portion of a rail line owned by CSX Transportation, Inc. Because the parties were unable to reach agreement on the sale of the line, the Town requested that the STB set the terms of sale. *See* 49 U.S.C. § 10904(e). CSX proposed a purchase price that was higher than the price it had suggested in prior negotiations and alleged that the price of scrap steel had risen steeply. The Town filed a motion to strike the evidence offered by CSX to demonstrate the increased value of the line, claiming that CSX wrongfully withheld this information until late in the proceedings. *See LaPorte,* 2004 WL 933330, at *1. The STB held that, although it generally
disfavors a party's later introduction of evidence that could have been presented in its initial pleading (particularly in

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OFA proceedings where the statutory time frames are short), the recent sharp increase in the price of scrap steel warrants consideration of the new evidence in light of the [STB's] duty to set a purchase price for the line that is no lower than the constitutional minimum value.

Id. at *2.

The STB's analysis in *LaPorte* does not constrain its choice of methodology in pricing TP&W's line in the present case. "[OFA] statutory time frames are short" and the proceedings transpire rapidly, *id.*; the regulations in *LaPorte* set a 30-day deadline on the submission of offers of financial assistance and on the submission of a request for the STB to establish the terms of sale after the parties fail to reach agreement, *see* 49 C.F.R. § 1152.27. As a result, market data submitted by parties in OFA proceedings, including the parties in *LaPorte,* is largely contemporaneous with the market conditions that existed both at the commencement of the litigation and at the time of final decision. By contrast, when litigation is more lengthy, it is likely that there will be a significant market shift in the price of steel between the date that proceedings are commenced and the date of final sale or taking (as occurred in the present case). Such a shift renders the selection of a date on which to price the steel arbitrary and makes price-averaging a reasonable alternative to traditional valuation schemes. Under similar circumstances, in fact, the STB has averaged prices to account for market fluctuations during feeder line proceedings. *See, e.g., Chicago & N.W. Transp. Co.-Abandonment between Ringwood, Illinois & Geneva,*

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Wisconsin, 363 I.C.C. 956, 960, 1981 WL 22668 (1988) (averaging prices for salvage over a six-month period, finding that current market prices "exaggerate[d] the value of the reusable rail involved"); *Chicago & N.W. Transp. Co.-Abandonment between Marshalltown (Powerville) & Cedar Falls Junction & between Hicks and Dike-in Marshall, Tama, Grundy & Blackhawk Counties, Iowa*, 1988 WL 225134, at *11 (STB Dec. 7, 1988) ("[The ***749** railroad] replies that it used the most recent 6-month average of scrap prices actually received ..., a procedure accepted in numerous other abandonment cases .... [It] has presented a reasonable estimate for the value of its rail, supported by adequate justification of its methodology."); *cf. GS Roofing*, 262 F.3d at 776 (affirming the STB's use of system-wide averages, rather than line-specific data, due to the lack of information and noting that, although this practice was not "preferable," it also could not be considered arbitrary or capricious). In fact, the STB has noted that "[u]se of a 6-month average to determine NLV for track ... is accepted methodology." *Chicago & N.W. Transp. Co.-Abandonment Between Steamboat Rock & Hampton in Hardin & Franklin Counties, Iowa*, STB Docket No. AB-1, 1989 WL 238616, at *2 n. 5 (1989). [FN20]

FN20. On appeal, TP&W contends that the STB's choice of dates by which to calculate a fourteen-month average price of steel was unreasonable and arbitrary. Specifically, it argues that the starting date of the fourteen-month average, April 2003, was improper

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> because "KJRY did not even file a proper application until June of 2003." Petitioner's Br. at 29. TP&W further contends that the ending date of the monthly average, July 2004, has no particular relevance to the case but rather is merely the last month of available data. These arguments, however, were not made in STB proceedings. In its petition for reconsideration, TP&W contended that the STB "failed to follow its own precedent in averaging the value of scrap steel," A.R. 212639 at 17, and noted that the STB should have used a six-month, rather than fourteen-month, average, *see id.* at 18; it did not argue that the specific starting and ending dates utilized by the STB were arbitrary or otherwise unreasonable. We therefore deem the argument waived and do not reach the matter on appeal.

In sum, because of unpredictable market conditions during the course of this litigation and the unpredictability of the date of final sale, and because this approach is consistent with both Supreme Court and agency precedent, we conclude that the STB's price-averaging methodology was not arbitrary or capricious.

B. Tax Credits

[3] TP&W next contends that the STB erred in refusing to consider the value of tax credits under the American Jobs Creation Act of 2004, 26 U.S.C. § 45G, in its determination

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of the line's constitutional minimum value. The American Jobs Creation Act permits a railroad to take a credit "equal to 50 percent of the qualified railroad track maintenance expenditures paid or incurred by an eligible taxpayer during the taxable year," not to exceed $3,500
multiplied by [ ] the sum of-[ ] the number of miles of railroad track owned or leased by the eligible taxpayer as of the close of the taxable year, and [ ] the number of miles of railroad track assigned for purposes of this subsection to the eligible taxpayer by a Class II or Class III railroad which owns or leases such railroad track as of the close of the taxable year.

26 U.S.C. § 45G(a), (b)(1). According to TP&W, its anticipated future investment in its rail line would entitle it to approximately $874,650 in tax credits over a three-year period-an amount it contends should be taken into account in determining the line's constitutional minimum value.[FN21]

FN21. TP&W also argues on appeal that the "[STB's] refusal to account for the value of tax credits in determining the Line's market value violated the Fifth Amendment." Petitioner's Br. at 37 (urging this court to review its claim of constitutional error de novo). However, TP&W did not raise its Fifth Amendment claim in agency proceedings: In its petition for reconsideration, TP&W argued only that standard valuation procedures required the STB to take into account tax credits for maintenance expenditures

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> under the newly enacted American Jobs Creation Act. *See* Petition for Reconsideration, A.R. 212639 at 19. For this reason, TP&W's argument that failure to account for tax credits under 26 U.S.C. § 45G violates its Fifth Amendment right to just compensation has been waived. Even if this argument was not waived, the above analysis demonstrates that the STB's refusal to consider the value of potential tax credits for maintenance of the line did not violate any constitutional guarantees.

***750** The STB held that tax credits should not be considered in calculating the constitutional minimum value of the line under 49 U.S.C. § 10907, both because tax credits are non-physical assets of the line, and therefore not part of the line's liquidated value, and because the STB found that it was "speculative at best ... whether TP&W would actually spend the funds necessary to entitle it or its corporate parent to a tax credit, much less the maximum tax credit." Petitioner's App., Ex.B at 13. As discussed previously, we shall reverse the STB's legal interpretation of a statute it is charged with administering only if it is arbitrary and capricious-in other words, if there are "compelling indications that the [STB's] interpretation is incorrect." *Caddo Antoine & Little Missouri R.R.*, 95 F.3d at 746 (internal quotation marks omitted). We review the STB's factual finding that TP&W did not plan to invest necessary funds in the line "for substantial evidence." *Cross v. Dep't of Transp.*, 127 F.3d 1443, 1448 (Fed.Cir.1997) ("We do not substitute our judgment for that of the board as to the weight of the evidence or the inferences

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to be drawn therefrom.").

The STB did not err in refusing to consider future tax credits available under 26 U.S.C. § 45G in calculating the net liquidation value of TP&W's rail line. Tax credits may be a proper consideration in calculating a line's going concern value, under which the line will continue to operate in a profitable manner. However, when "there is no evidence of a higher going concern value for continued rail use," the STB calculates a line's constitutional minimum value by evaluating its net liquidation value, the property's "highest and best nonrail use." *New York Cent. Lines, LLC-Abandonment Exemption-In Berkshire County, Mass.*, STB Docket No. AB-565, 2002 WL 599179, at *2 (April 18, 2002). In that scenario, the STB is to calculate the sale price "on the basis of what the seller would have realized from the sale of the assets had the line in fact been abandoned," the track materials salvaged and the land sold. *Iowa Terminal R.R. Co. v. I.C.C.*, 853 F.2d 965, 969 (D.C.Cir.1988).

TP&W does not dispute that, but for the feeder line application, it would have abandoned the La Harpe-Hollis Line, selling its track and rail materials for scrap. The line, with the exception of the Mapleton Spur, which TP&W will retain post-sale, no longer earns a profit and therefore has no going concern value.[FN22] Therefore, TP&W should be compensated only for the " 'the nonrail market value of [its] assets.' " *Id.* (quoting *Chicago & N.W. Transp. Co. v. United States*, 678 F.2d 665, 668 (7th Cir.1982) (alteration in original)). Non-physical assets are not an appropriate

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consideration in this calculation: " 'The purpose*751 of [section 10905] would be frustrated if the Commission were required to consider the value of the [line] to the offeror' as part of an operating railway rather than the price the seller would have received from the sale of the [line] for nonrail uses." *Id.* (quoting *Chicago & N.W. Transp. Co.*, 678 F.2d at 668) (first alteration in original).

> FN22. As the STB explained,
> TP&W and KJRY agree that the traffic originating or terminating on the Western Segment is inadequate to give it a GCV that is higher than NLV, and it is not apparent how the Eastern Segment, without the Mapleton Spur traffic, could have a GCV higher than NLV. The Eastern Segment neither originates nor terminates traffic; its only value to TP&W is in the access it provides to the traffic-heavy Mapleton Spur. With TP&W retaining ownership of, exclusive access to, and all the revenues from, the Mapleton Spur, and receiving virtually cost-free trackage rights to continue serving the Spur, the Eastern Segment cannot have a separate, higher GCV.
> Petitioner's App., Ex.A at 11.

As a result, savings realized from tax credits are not part of the line's net liquidation value. As the D.C. Circuit explained in *Iowa Terminal Railroad:*

Petitioner argues, on appeal, that it is at least entitled to the benefit of the tax savings it would have realized had it been

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able to deduct the value of the right-of-way as a charitable gift in its income tax returns. Such a position stretches the statute too far. Subsection 10905(f)(1)(C) requires the [STB] to determine the fair market value of an asset to a nonrail purchaser, not its after-tax value to the vendor.

Id. at 969 (internal citations omitted). In sum, because the parties agree that the line's constitutional minimum value should be calculated using a net liquidation formula rather than a going concern formula, and because TP&W does not contest that the line's highest and best nonrail use requires sale of the land and salvage of the track and materials, we simply cannot understand why it would be appropriate to compensate TP&W for prospective tax credits, which assume, and indeed require, continued operation of the line.

Moreover, even if tax credits were an appropriate consideration in calculating a line's NLV, they are not an appropriate consideration in this case. TP&W apparently concedes that it does not plan to invest over half a million dollars per year in maintaining the 76 miles of track that it owns or leases as part of the La Harpe-Hollis Line, the sum necessary to render it eligible for $874,650 in tax credits over the three-year period. It instead contends that it is entitled to tax credits for maintenance it expects to perform elsewhere on its system. According to TP&W, it planned to invest $1,981,000 system-wide on the 283 miles it owns or leases per year, entitling it to a yearly tax credit of $990,500, $291,550 of which is attributable to railroad track owned or leased as part of the La Harpe-Hollis Line. But TP&W's only

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evidence on this subject relates exclusively to what TP&W's maintenance *budget* is; there is no evidence that TP&W actually has invested, or would invest, the sum claimed on maintaining its rail lines.

Nor is there evidence that TP&W planned to keep the La Harpe-Hollis Line long enough to accrue the relevant tax credits. The sum of tax credits claimed by TP&W-$874,650-assumes that TP&W would retain and invest in the line for three years. But TP&W previously attempted to sell the line as salvage to SF & L, and even its Chief Engineer, Mark Garvin, stated that, given high steel prices, TP&W-if permitted by the STB-would have abandoned the line and sold the track and materials for scrap. *See* Petition for Reconsideration, A.R. 212639 at 18 (noting that November 1, 2004, is the date closest to when "Mr. [G]arvin would [have] voluntarily [sold] the [line for] scrap steel").

We therefore reject the claim that the STB should have compensated TP&W for the value of tax credits to which TP&W allegedly was entitled under 26 U.S.C. § 45G.

C. Land Title Analysis

[4] TP&W contends that the STB erred in permitting KJRY to submit Mooty's real estate appraisal for the first time on rebuttal. TP&W further submits that, because KJRY was permitted to submit Mooty's analysis in an untimely fashion, ***752** the STB was required to offer TP&W an opportunity to

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rebut Mooty's methodology and conclusions. According to TP&W, the STB therefore erred in excluding Gray and Borstein's land title analysis, submitted by TP&W with its petition for reconsideration.

TP&W's argument that the STB erred in permitting KJRY to submit a new real estate analysis along with its reply brief has not been preserved properly for our review. At no time prior to the STB's October 2004 decision did TP&W object to KJRY's submissions; TP&W instead waited to raise the argument until the STB had issued an unfavorable decision. Although TP&W is correct that the rules do not permit the filing of a reply to a reply, *see* 49 C.F.R. § 1104.13(c), it could have filed a motion to strike Mooty's appraisal,[FN23] or petitioned the STB to respond to that appraisal. We therefore deem the argument waived. *See Ester*, 250 F.3d at 1072.[FN24]

FN23. TP&W appears to have been aware of the standards governing the supplementation of the record; indeed, it previously had requested that the STB allow the introduction of updated evidence and materials. *See* A.R. 210184 at 4 (petitioning the STB to supplement the record with updated steel prices and noting that the STB has discretion to allow the record to be supplemented when the information is "central to the petitioning party's case" and other relevant requirements are met). Similarly, the STB previously had indicated its willingness to grant TP&W's requests to supplement the record. At the very least, this

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suggests that TP&W knew that it could request permission from the STB to respond to Mooty's analysis and to submit Gray and Borstein's appraisal prior to the record's closing.

FN24. TP&W contends that, because STB regulations require KJRY to provide an estimate of " 'NLV and GCV of the line' " in its " 'initial application,' " Petitioner's Br. at 33 (citing 49 C.F.R. § 1151.3), and because "KJRY submitted no real estate analysis, or evidence supporting such an analysis, in its opening application," the STB was "bound to accept Cecil's valuation because it was the only timely credible evidence before [it]," *id.* at 34. This is a mischaracterization of the proceedings. KJRY did submit with its initial application a real estate analysis, which was based on the best evidence available to it at that time; this analysis included a preliminary statement about TP&W's land holdings, and noted that necessary documents, including TP&W's deeds and valuation charts, had not been produced as requested, hindering its ability to perform a traditional real estate appraisal. As required by STB regulations, *see* 49 C.F.R. § 1151.2(d)(1), along with its feeder line application, KJRY therefore filed discovery requests, asking TP&W for copies of these documents. In submitting Mooty's analysis on rebuttal after receiving the relevant materials, KJRY merely was updating its previously-submitted, incomplete analysis-a matter over which the STB retains substantial discretion.

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> *See Delta Airlines, Inc. v. Civil Aeronautics Bd.*, 561 F.2d 293, 307 (D.C.Cir.1977) ("[S]upplementation [of the record], in whatever form, is a matter entrusted to agency discretion."). The STB was within its discretion in accepting this newly-submitted evidence; 49 C.F.R. § 1151.2(d)(1) allows the filing of an "incomplete application" and later supplementation of the record "[i]f [the] applicant ... is unable to obtain required information that is primarily or exclusively within the personal knowledge of the owning carrier ... if it files at the same time a request for discovery under 49 CFR part 1114 to obtain the needed information from the owning carrier."

[5] We also cannot accept TP&W's argument that the STB erred in excluding Gray and Borstein's land title analysis, which was offered by TP&W along with its November 2004 petition for reconsideration. The STB held that this evidence was untimely filed and, because it was not based on "newly available evidence," did not warrant reconsideration of its prior decision. Petitioner's App., Ex.B at 5. We review the STB's denial of a petition for reconsideration for abuse of discretion. *See* ***753***Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd.*, 252 F.3d 246, 260 (3d Cir.2001).

The STB did not abuse its discretion in refusing to consider Gray and Borstein's land title analysis. As an initial matter, contrary to TP&W's contention, the STB is not constitutionally required to consider *all* evidence submitted

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prior to the date of taking, when that evidence is offered in an untimely fashion. *See* Petitioner's Br. at 31 (maintaining that the STB must consider all evidence on the topic of the line's constitutional value, "even if it cause[s] inconvenience to the Board"). Title 49 of the United States Code at § 722 requires the STB to grant "reconsideration of an action" only when there is "material error, new evidence, or substantially changed circumstances." 49 U.S.C. § 722(c)(2). As the STB has explained previously:

[T]he Board generally does not consider new issues raised for the first time on reconsideration where those issues could have and should have been presented in the earlier stages of the proceeding. Moreover, the term "new evidence" refers to evidence that was not reasonably available to the party when the record was developed, and not simply newly raised. Nothing in the statute or the [STB's] regulations obliges the agency to rethink its decisions whenever a party wishes to try out a new theory or finds new information at a late stage in the process. And if a party were free to reshape its case, so long as it did so within 20 days after a decision, the administrative process might never end. The agency is not expected to behave like Penelope, unraveling each day's work to start the web again the next day.

Texas Mun. Power Agency v. Burlington N. & Sante Fe R.R. Co., STB Docket No. 42056, 2004 WL 2619767, at *2 (Sept. 24, 2004) (internal citations and quotation marks omitted); *see also Canadian Nat'l Ry. Co., Grand Trunk Corp., & Grand Trunk W. R.R., Inc.-Control-Ill. Cent. Corp., Ill. Cent. R.R. Co., Chicago, Cent. & Pac. R.R. Co., & Cedar River*

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R.R. Co., STB Docket No. 33556, 2002 WL 1969505, at *4 (Aug. 23, 2002) (holding that, to be considered after the STB issues a final decision, the offering party must demonstrate that the new evidence not only is "newly presented" but also is "evidence that could not have been foreseen or planned for at the time of the original proceeding").

TP&W does not contend that the Gray and Borstein land title analysis constitutes "evidence that could not have been foreseen or planned for at the time of the original proceeding." *Id.* Gray and Borstein relied on the same evidence-deeds, real estate maps and other valuation documents-that Mooty had cited in his appraisal and that were submitted with TP&W's real estate appraisal authored by Cecil and filed in a timely manner. Obviously, these documents were "reasonably available to the party when the record was developed," *Texas Mun. Power Agency*, 2004 WL 2619767, at *2; indeed, these documents were *part of the record* long before the record closed and the STB issued its final decision. Moreover, there is no valid reason why TP&W did not employ Gray and Borstein to perform a land title analysis while preparing its materials for its response brief, or, if not then, after KJRY submitted Mooty's analysis but before the record closed. Because "evidence that was reasonably available to the parties before the proceeding is not new evidence for purposes of [49 U.S.C. § 722]," and because Gray and Borstein's land title analysis raised before the STB "the same substance" as had and could have been raised earlier, we believe that the STB did not abuse its discretion in granting KJRY's motion to strike this evidence.

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***754** *Friends of Sierra R.R., Inc. v. I.C.C.*, 881 F.2d 663, 667 (9th Cir.1989) (internal quotation marks omitted).

Conclusion

For the reasons set forth in the foregoing opinion, we deny TP&W's petition for review of the STB's order.

Affirmed.

C.A.7,2006.
Toledo, Peoria & Western Ry v. Surface Transportation Bd.
462 F.3d 734, Fed. Carr. Cas. P 84,466

Briefs and Other Related Documents (Back to top)

- 2005 WL 3736446 (Appellate Brief) Reply Brief of Petitioner - Toledo, Peoria & Western Railway Corporation (Nov. 7, 2005) Original Image of this Document (PDF)
- 2005 WL 3736445 (Appellate Brief) Joint Brief of Respondents Surface Transportation Board and United States of America (Oct. 14, 2005) Original Image of this Document (PDF)
- 2005 WL 3736444 (Appellate Brief) Brief of Intervenor-Respondent Keokuk Junction Railway Co. (Oct. 13, 2005) Original Image of this Document (PDF)
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462 F.3d 734
462 F.3d 734, Fed. Carr. Cas. P 84,466
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Appendix (PDF)
• 05-1920 (Docket) (Apr. 7, 2005)

END OF DOCUMENT

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Fed. Carr. Cas. P 37185, 2005 WL 281909 (S.T.B.)
(Cite as: Fed. Carr. Cas. P 37185, 2005 WL 281909 (S.T.B.))

Fed. Carr. Cas. P 37185, 2005 WL 281909 (S.T.B.)

Surface Transportation Board (S.T.B.)

KEOKUK JUNCTION RAILWAY COMPANY--FEEDER LINE ACQUISITION--LINE OF TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION BETWEEN LA HARPE AND HOLLIS, IL

Decided: February 7, 2005

SURFACE TRANSPORTATION BOARD DECISION

STB Finance Docket No. **34335**

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

***1** This decision will be printed in the bound volumes of the STB printed reports at a later date.

On reconsideration, the Surface Transportation Board affirms its decision ordering the sale of a 76-mile rail line owned by Toledo, Peoria & Western Railway Corporation to Keokuk Junction Railway Company but increases the purchase price previously set by the Board and establishes a new closing date for the transaction.

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In a decision served on October 28, 2004 (October Decision), the Board ordered Toledo, Peoria & Western Railway Corporation (TP&W) to sell its La Harpe-Hollis Line (the Line) in western central Illinois to Keokuk Junction Railway Company (KJRY) under the feeder line development provisions of 49 U.S.C. 10907. The Line extends 76 miles from La Harpe (milepost 194.5), where it connects with KJRY's line, to Hollis (milepost 118.5), where it connects with a line of the Union Pacific Railroad Company (UP). On November 29, 2004, TP&W filed a petition for reconsideration. TP&W's petition for reconsideration will be granted in part, and we will modify in some respects the purchase price for the Line. In all other respects reconsideration will be denied.

BACKGROUND

KJRY filed its feeder line application in April 2003. The Board found it deficient in a decision served in May 2003. An amended application (Application) was filed on June 9, 2003, and accepted in a decision served on July 9, 2003. TP&W and the United Transportation Union-Illinois Legislative Board (UTU-IL) opposed the application and filed verified statements and comments (Comments) in October 2003, to which KJRY filed a verified reply in November 2003. In March 2004, TP&W sought to supplement the record with new evidence regarding the price of scrap steel, which TP&W claimed had increased dramatically, causing the Line to have

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a significantly higher net salvage value (NSV) than it had originally claimed. KJRY filed a reply later that month, which it supplemented in June 2004. In the supplement, KJRY claimed that the price of scrap steel had since dropped. TP&W also filed a reply in June 2004.

In the October Decision, we determined that the public convenience and necessity permitted the sale of the Line to KJRY, see 49 U.S.C. 10907(b)(1)(A)(i), and the Board set the purchase price at the Line's net liquidation value (NLV), see 49 U.S.C. 10907(b)(1), which we found to be $3,940,756. Additionally, the Board stated that we would increase the Line's purchase price if TP&W submitted evidence establishing a higher net salvage value (NSV) for the Line's "reroll" rail. The Board gave KJRY until December 2, 2004 (or later if TP&W supplemented the record on reroll rail), to notify us and TP&W whether it wished to proceed with the purchase under the terms prescribed in the decision. We also ordered KJRY to hold open until December 2, 2004 (or later if TP&W supplemented the record), its offer to enter into an agreement that would provide TP&W with trackage rights over a portion of the Line for a nominal fee ($1 per year). The parties were given 90 days to close on the sale of the Line.

***2** KJRY accepted the terms prescribed in the October Decision in a letter filed on November 1, 2004. The October Decision became effective on November 27, 2004, after the Board's Chairman denied stay petitions filed by TP&W and UTU-IL. TP&W then filed the instant petition for reconsideration, which included updated data on the price of

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scrap steel and reroll rail. In December 2004, KJRY filed a motion to strike and replies to both TP&W's reroll rail evidence and petition for reconsideration, and TP&W filed a reply to KJRY's motion to strike. In a decision served on January 24, 2005, the Board extended the transfer closing date by 30 days, to February 25, 2005, and ordered KJRY to hold open until February 18, 2005, its trackage rights offer.[FN[FN1]]

In setting the purchase price at $3,940,756, we determined that the Line has an NSV of $3,899,121. Our NSV determination primarily relied on TP&W's data as supplemented to factor in the current volatility in the price of scrap steel. We set the unit price for scrap steel at $157.16 per ton, the composite monthly average for No. 1 heavy melt steel scrap from April 2003 (the month the feeder line application was filed) through July 2004 (which at the time was the last month of available data). This composite monthly average was based on the Mineral Industry Surveys for Iron and Steel Scrap of the United States Geological Survey, which in turn is based on aggregate monthly data from two trade publications, American Metal Market (AMM) and Iron Age. Because similar data on reroll were believed to exist but were not of record or available to us, we relied on the unit values for reroll rail originally submitted by TP&W. We provided, however, that TP&W could supplement the record with a composite monthly average unit price for reroll rail using AMM and (if available) Iron Age data for the April 2003-May 2004 time period, and that KJRY would have 10 days to submit a reply.

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Our land value determination primarily relied on TP&W's data and on expert testimony submitted by KJRY on rebuttal. In its Application, KJRY acknowledged that it had insufficient information on the quantity of land in the right-of-way or the quality of TP&W's interest in it. KJRY estimated that the right-of-way of the La Harpe-Mapleton segment consisted of 864 acres, assumed that TP&W held a fee interest in 50% of the acreage, and on that basis valued the right-of-way at $100,000. On a pro rata basis, KJRY valued the right-of-way of the Mapleton-Hollis segment at $6,336.

TP&W responded that KJRY had failed to produce a land valuation and offered its own land valuation analysis performed by Todd N. Cecil, Vice President of Real Estate for RailAmerica, Inc., TP&W's corporate parent. Cecil first analyzed the real estate deeds of the land parcels making up the right-of-way. He then developed values for the land parcels owned in fee by (1) dividing the right-of-way into 294 land parcels reflecting adjacent zoning and land use patterns; (2) reducing their acreage to account for land encumbered by road and street rights-of-way; (3) using an across-the-fence (ATF) analysis to identify 54 comparable property sales that had occurred since September 2000; (4) dividing the time-adjusted sale price of the comparables by their acreage to obtain unit values; (5) adjusting the resulting unit values where necessary by 10% to 20% to account for such factors as location, shape, size, access, physical orientation, and topography; and (6) multiplying the acreage of the fee-owned

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parcels by the appropriate adjusted unit values. Cecil discounted the resulting land values by 8% to account for commissions, administrative costs, advertising, and promotion, and by an additional 5%, on an end-of-year basis, to account for a 3-year sell-off period, reflecting his position that most of the property is very marketable and likely to sell within a short period of time. This yielded a total piecemeal land valuation of $2,863,173.

***3** In rebuttal, KJRY submitted two expert analyses: a land title evaluation prepared by Brian Mooty, an Illinois real estate attorney, and a verified statement prepared by L. Arlen Higgs, an Illinois-certified real estate appraiser. Mooty examined the more than 200 deeds appended to Cecil's verified statement, divided them into 18 groupings based on their form and language, and concluded that TP&W owned a fee interest in only 6 groupings, equating to 31.657 acres.

Higgs questioned the 54 comparable land sales used in Cecil's ATF analysis, claiming that they involved properties adjoining active rail lines, which are valued higher for their industrial and commercial potential. Higgs developed his own analysis using the sales over a 15-year period of six abandoned Illinois rights-of-way to neighboring or nearby landowners, determined that the value of those properties had been discounted by 51% to 84% to account for unusual shapes, left-over ballast, and limited purchaser pool, and concluded that a 4-year sell-off period was more appropriate. KJRY further claimed that TP&W had a fee interest in only 28.24 acres and, based on Higgs' verified statement, applied

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an average discount of 70% to Cecil's adjusted land value, which KJRY prorated. KJRY then discounted the resulting values to reflect a 4-year sell-off period. We found Mooty's and Higgs' analyses more credible than that presented by TP&W, but we rejected the reduction in acreage that Mooty had calculated. We set the land value at $41,635, based on 31.657 acres owned in fee.

DISCUSSION AND CONCLUSIONS

Motion to Strike

In its petition for reconsideration, TP&W raises a variety of arguments. The arguments on which the motion to strike focuses principally assert that the price set for the Line is far too low. Because the feeder line provisions effect a taking, TP&W argues, a price that is too low would violate its constitutional rights. Thus, in its petition for reconsideration, TP&W contends that it has a due process right to now submit additional evidence on the Line's NLV and that this right was recognized in the Board's decision denying TP&W's stay request.

Land Valuation. The valuation of the land could have the most significant impact on the overall price that TP&W receives for the Line. TP&W points out that KJRY's opening evidence was inadequate. TP&W thus states that it had no choice but to respond substantively and did so with Cecil's land-title analysis and ATF valuation, to which KJRY responded with what was effectively its case-in-chief, the

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opinion of Mooty and the verified statement of Higgs. Our acceptance of Mooty's opinion and Higgs' verified statement on rebuttal, TP&W maintains, deprived it of an opportunity to reply, constituted a denial of its due process rights, and resulted in material error.

TP&W's petition for reconsideration includes an entirely new land title analysis prepared by Wildman, Harold, Allen & Dixon (Wildman), a law firm retained for that purpose, and verified statements by Charles W. Rex and Douglas S. Golden. Rex and Golden analyze Cecil's appraisal and Higgs' verified statement and conclude that the former does, and the latter does not, comply with Board standards. Golden's verified statement includes a new valuation of the Line's real estate using the Wildman title analysis and Higgs' 4-year sell-off period.

***4** As TP&W points out, in a feeder line application the burden of proof is on the applicant to establish, in its case-in-chief, the value of the rail line, including its real estate. Where the applicant fails to present its case-in-chief on opening, we may rely on the owner's valuation evidence. And even after we issue a decision on the merits, an owner may seek to introduce new evidence that was not available earlier. The valuation evidence that TP&W submitted more than a year after Higgs submitted his appraisal, however, is not newly available evidence. Moreover, TP&W has gone beyond arguing that its earlier evidence on real estate value, rather than KJRY's, is correct. Rather, TP&W seeks to rely upon an entirely new valuation, submitted for the first time in its

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petition for reconsideration. TP&W's attempt to submit an entirely new land title analysis that would relitigate its ownership of the underlying real estate is inappropriate here, as TP&W could have submitted this evidence much earlier.

We recognize that our rules of practice, 49 CFR 1104.13(c), preclude replies to replies. But our rules are to be construed liberally to effect justice, 49 CFR 1100.3, and in several cases we have accepted replies to replies where it was appropriate to do so. See, e.g., SMS Rail Service, Inc.-- Petition for Declaratory Order, STB Finance Docket No. 34403, slip op. at 3 (STB served Jan. 24, 2005). Given that the Mooty and Higgs analyses were not presented by KJRY until its rebuttal, we would have permitted TP&W to respond to them in a timely way, had it attempted to do so.

TP&W did not, however, respond in a timely way to the Mooty and Higgs analyses. Instead, it waited more than a year, and in addition to addressing those filings, it presented an entirely new case. We are here accepting for consideration TP&W's argument that the Higgs' analysis (for KJRY) was less credible than the Cecil analysis initially presented by TP&W. But TP&W's new analysis of what land is and is not held in fee is based entirely on evidence that was available at the time TP&W filed its Comments and could have been submitted at that time or in a subsequent motion to supplement the record. Our rules of practice specifically provide that a party seeking to introduce evidence on appeal must explain "why it was not previously adduced." See 49 CFR 1115.3(c). TP&W's due process argument does not

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explain its failure to introduce this evidence when the record was open. Both the Board and its predecessor, the Interstate Commerce Commission (ICC), have routinely refused to accept evidence on appeal if that evidence was available but was withheld until after a result is obtained that is not to a party's liking. See, e.g., Pejepscot Industrial Park, Inc. d/b/a Grimmel Industries--Petition for Declaratory Order, STB Finance Docket No. 33989, slip op. at 3 (STB served Nov. 7, 2003); B. Willis C.P.A. Inc.--Petition for Declaratory Order, STB Finance Docket No. 34013, slip op. at 3-4 (STB served July 26, 2002); S.R. Investors, Ltd. d/b/a Sierra Railroad Company--Abandonment--in Toulumne County, CA, Docket No. AB-239X, slip op. at 3 (ICC served Jan. 26, 1988).

***5** TP&W argues that in our November decision we recognized its due process right to now file new land valuation evidence on appeal. But TP&W misinterprets that decision. Indeed, that decision explicitly pointed out (at 3) that "TP&W could have petitioned for leave to supplement the record in response to KJRY's reply submission, as it did with respect to the salvage value of the rail on the Line, but chose not to do so." With respect to due process, the decision simply said (id.) that the Board would extend the deadline to petition for reconsideration. TP&W represented that it would submit newly available evidence supporting its claims that it had "sold parcels along the Line that the Board has concluded are not owned by TP&W in fee simple as fee simple property and that the buyer has obtained title insurance for those parcels." See TP&W stay petition at 9 n.5. But no evidence of new sales was submitted on reconsideration. Our statement

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about due process was hardly an invitation to file a brand new land valuation analysis consisting of evidence that was always available and that TP&W could have produced, but did not, for the record that led to the October Decision.

In any event, TP&W responded by letter on February 3, 2005, to our recent order directing it to identify which, if any, of the properties it claimed to have sold were included in its valuation of the Line's right-of-way (see supra note 1). TP&W listed six properties in the Line's right-of-way that were sold or transferred since it had filed its Comments in October 2003, and claimed that title insurance was issued for one of the six properties. TP&W's title insurance claim, however, was neither verified nor supported by documentary evidence.

A feeder line case must end at some point even though constitutional minimum value is at issue. Indeed, in GS Roofing Products Co., Inc. v. STB, 262 F.3d 767, 774 (8th Cir. 2001), the Eighth Circuit agreed, explaining that it would not require the Board to consider "potentially endless submissions" of valuation evidence for a line being sold under 49 U.S.C. 10907. Likewise, the Board rejects late-filed valuation evidence in a forced sale under section 10904, where the party could have submitted that evidence earlier. See New York Central Lines, LLC--Abandonment Exemption--in Berkshire County, MA, STB Docket No. AB-565 (Sub-No. 3X), slip op. at 4 (STB served July 12, 2002) (the line's owner "could have suggested this valuation method previously, but chose not to do so, and it is not entitled to have alternative approaches that were not timely presented to

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us considered now" on reconsideration).

Especially in light of the duration of this proceeding, in which TP&W has utilized many tactics to interpose delay, it would not be appropriate to permit TP&W to relitigate the case. Accordingly, KJRY's motion to strike will be granted as to the portions of TP&W's legal argument that relate to the new land title analysis prepared by Wildman, the Wildman title analysis, and Golden's new appraisal of the Line's real estate. KJRY's motion to strike will be denied as to the portions of TP&W's legal argument and the portions of Rex's and Golden's verified statements that allege material error in our land valuation analysis.

***6** Net Salvage Value. TP&W also argues in its petition for reconsideration that we erred in averaging the price of scrap steel instead of valuing it at its market price on the day our decision was served. TP&W includes a verified statement prepared by Mark D. Gavin, four appended spreadsheets, and a chart. Using prices from AMM and Iron Age, the four spreadsheets show the NSVs of the La Harpe-Canton and Canton-Hollis segments of the Line as of November 1, 2004, the date TP&W allegedly would have sold the scrap if this were a voluntary sale. The chart shows the AMM prices for scrap steel and reroll rail as of the first day of each month from April 2004 through November 2004. TP&W argues that we should have set the price of scrap steel at its market price as of November 1, 2004, and Gavin's verified statement and appendices restate the Line's NSV on that basis.

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Under our appellate rules, TP&W has a right to allege material error and submit related evidence in support of its allegations if that evidence was not previously available. KJRY's motion to strike will therefore be denied with respect to the portions of TP&W's legal argument that allege material error in our use of averaging to set a price for scrap steel. Additionally, KJRY's motion to strike will be denied with respect to Gavin's verified statement and appendices.

TP&W's Settlement Offer. Finally, TP&W in its petition for reconsideration offered to settle the dispute by selling KJRY the 54.5-mile portion of the Line between La Harpe and Canton, IL (milepost 140), for an NLV that reflects the real estate and scrap values in TP&W's petition for reconsideration, and granting KJRY trackage rights over the portion of the Line between Canton-Hollis at standard industry rates and on standard industry terms. KJRY's motion to strike TP&W's settlement offer will be denied. KJRY contends that the offer is irrelevant to what was sought in filing the instant Application, that it has no place in a petition for reconsideration, and that it is not acceptable. While the settlement offer may be irrelevant to the issues on reconsideration, it is not prejudicial to KJRY's interests, and as a consequence we see no reason to strike it.

Request for Oral Argument

TP&W has asked, as part of its petition for reconsideration, that we grant oral argument. It argues that our decision constitutes a taking of unprecedented scope, applying to more

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than a third of its system; that circumstances have changed substantially and can be best explained in an oral argument; and that there are serious issues relating to railroad real estate and scrap steel. TP&W has failed to demonstrate why written pleadings are inadequate here, and we see no good reason to grant a request for oral argument at the reconsideration phase of this proceeding. Indeed, oral argument would delay even further the resumption of rail service to shippers, who have not had rail service since at least October 2002, when SF&L Railway, Inc. (SF&L) embargoed the La Harpe Line. See SF&L Railway, Inc.--Acquisition and Operation Exemption--Toledo, Peoria and Western Railway Corporation Between La Harpe and Peoria, IL, STB Finance Docket No. 33995 et al. (STB served Feb. 6, 2003) (denying a stay of the Board decision that ordered SF&L to reconvey its interest in the La Harpe Line to TP&W). TP&W's request for oral argument will therefore be denied.

Petition for Reconsideration

The Public Convenience and Necessity Determination.

*7 TP&W argues that the record does not demonstrate that it refused to provide adequate service to the Line's shippers or that service to a majority of the Line's shippers was inadequate. TP&W claims that our findings in this regard were based on the unverified letters of 10 shippers who complained that service was inadequate and rates were too high, but none of whom had requested, or been denied, rail service. TP&W also claims that we erred in characterizing the

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rates it proposed to charge as unreasonable, contending that such determinations can be made only after we find that the rail carrier has market dominance over the transportation, 49 U.S.C. 10707, and make a reasoned finding of rate reasonableness under the appropriate standards.

In the October decision, we found persuasive evidence of both a need for rail service by the Line's shippers and an unwillingness or inability of TP&W to provide rail service at rates that would allow traffic to move. Based on these findings, and not on the intrinsic reasonableness of any specific rates, we concluded that TP&W's service was inadequate. Our conclusion was fully supported by: (1) the letters from shippers; (2) the evidence that TP&W actively discouraged the use of the Line west of milepost 121.5 at Kolbe, IL, where it connects to the Mapleton Industrial Spur and Wye Facilities (the Spur); (3) TP&W's previous actions concerning the La Harpe Line;[FN[FN2]] and (4) the legislative history of 49 U.S.C. 10907. Our reliance on shipper letters to establish a need for service was consistent with longstanding precedent in abandonment proceedings and most other areas of Board jurisdiction. Indeed, we must administer our regulatory responsibilities in a manner that meets the needs of the shipping public. See 49 U.S.C. 10101(4).

1. The Five Spur Shippers. TP&W argues that our finding that shippers were not receiving adequate service mistakenly characterized the five Spur shippers (who were continually provided service by TP&W) as overhead shippers. The argument is largely semantic, but in any case, it is not

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material to the result we reached. In finding service inadequate for the majority of shippers that use the Line, 49 U.S.C. 10907(c)(1)(B), we called the Spur shippers overhead shippers because they are located on the Spur, which TP&W will continue to own and operate, and not on the Line itself. In any event, we found that the majority of the Line's shippers are not receiving adequate rail service regardless of whether the Spur shippers are considered online or overhead shippers.

2. The Mapleton-Hollis Segment. Additionally, TP&W argues that we should not order it to sell the Mapleton-Hollis segment of the Line, which connects at Kolbe with the Spur that TP&W is retaining. Although no shippers are physically located on the Mapleton-Hollis segment, TP&W contends that it has continuously operated over and marketed that segment, that none of the shippers located on the Spur have complained about the service it provides or the rates it charges for movement over that segment, and that it never sought to sell or abandon that segment. We continue to believe that the public interest requires the sale of the Mapleton-Hollis segment (over which KJRY is offering TP&W trackage rights) along with the rest of the Line.

***8** Through this Application, KJRY seeks to reconnect and operate TP&W's entire West End from milepost 206.6 at Lomax, IL (on the Iowa-Illinois border) to Hollis.[FN[FN3]] The West End is separated from the rest of TP&W's system.[FN[FN4]] It was constructed in 1868 by The Toledo, Peoria & Warsaw Railroad, a TP&W predecessor, for access to the Mississippi River and beyond. And until TP&W sold the La Harpe Line

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to SF&L in 2000, the West End was properly considered a unitary, historically integrated line that was advertised and used as part of a through route linking the East to the West.

The value of the Mapleton-Hollis segment to TP&W is in the access it gives to the highly profitable Mapleton Spur, the source of the largest concentration of traffic on TP&W's system. But TP&W does not need to own the Mapleton-Hollis segment to retain the Spur traffic. Rather, acceptance of KJRY's offer of virtually cost-free trackage rights will ensure TP&W continued access to the Spur without it having to compete for Spur traffic or having to contribute to the segment's upkeep and maintenance.

On the other hand, full access to the Mapleton-Hollis segment is integral to KJRY's plan to reactivate and operate the La Harpe-Hollis Line as an effective and efficient route for local and through traffic, including traffic between the East and the West. TP&W has not offered KJRY trackage rights over just the Mapleton-Hollis segment. The trackage rights that TP&W has offered--over the much longer 54.5-mile Canton-Hollis segment--have been offered at "standard industry" rates and terms, in contrast with KJRY's offer to TP&W of virtually cost-free trackage rights over the Kolbe-Hollis segment.

Based on these considerations, we continue to believe that it was appropriate and consistent with the purposes of the Feeder Railroad Development Program to accept and grant KJRY's feeder line application to purchase the entire La

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Harpe-Hollis Line.

3. Trackage Rights. Finally, TP&W disputes our finding that it will be in the same or a better position with trackage rights over the Kolbe-Hollis segment. TP&W's contention, that trackage rights are not an adequate substitute for ownership and control, is curious given its own offer of trackage rights to KJRY over the much longer Canton-Hollis segment at the standard industry fee. Moreover, the long-term reliance by TP&W and its predecessors on trackage rights to connect the West End to the rest of their respective systems, and the corresponding long-term reliance of the national rail system on trackage rights, demonstrates the importance of trackage rights as an alternative to ownership. All things considered, we continue to believe that the public interest is best served if TP&W is required to operate over 3 miles of essentially free trackage rights.

TP&W renews its claim that KJRY's trackage rights will be significantly more costly than its one dollar per year rental fee, but we find the claim to be without merit. We reviewed each of the charges in the proposed agreement and, with one exception, found them to be relatively minor and related to specific services KJRY might be asked to perform if TP&W does not operate in a responsible way. The one exception--that KJRY and TP&W share equally the cost of constructing any new connecting track or facilities that might be needed on the 3-mile Hollis-Kolbe segment--we also found within TP&W's ability to avoid. We see no reason to question KJRY's intent to carry out its obligations under the proposed

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trackage rights agreement. KJRY has stated that it will honor its agreement and will treat TP&W fairly, and we are prepared to act against impediments that could jeopardize TP&W's ability to serve Spur shippers.

***9** For all of these reasons, we reaffirm our findings that: (1) there is a need for rail service by a majority of the Line's shippers; (2) TP&W is either unwilling or unable to provide rail service at commercially viable rates; (3) granting KJRY's application will lead to improved service for the Line's shippers; and (4) KJRY's trackage rights offer provides TP&W with an operationally viable and virtually cost-free means to continue serving Mapleton Spur shippers.

The Valuation.

1. Going Concern Value. TP&W contends that, since its Comments were filed, a significant new shipper has emerged at Canton, and, as a result, the Canton-Hollis segment must now be considered a distinct line segment with a going concern value (GCV) and must be valued accordingly under 49 U.S.C. 10907(b)(2). TP&W contends that, under 49 U.S.C. 10907(b)(1), the constitutional minimum value of the Line may not be set at less than $9,152,955, based on an NLV of $5,855,083 for the La Harpe-Canton segment ($4,896,976 for NSV using AMM scrap prices and $958,107 for land value) and a GCV of $3,297,872 for the Canton-Hollis segment.

TP&W claims that it entered into discussions with the prospective new shipper in March 2004 and that a contract

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was ready to be executed when KJRY's feeder line application was granted in the October Decision. Contending that the decision caused the shipper to have second thoughts about entering into the contract, TP&W argues that it is entitled to be compensated for having sought and attracted the new traffic.

The prospective new shipper submitted a verified statement in which it acknowledged exchanging contract drafts with TP&W but emphasized that there was neither a meeting of the minds nor an agreement on a contract. According to the shipper, one significant issue and numerous smaller issues remained unresolved, making any potential agreement speculative. Moreover, the shipper maintains that it would not have agreed to any contract tonnage guarantees because of the other alternatives available to it and that TP&W was made aware of this at all times during the contract negotiations but continued to insist on tonnage guarantees. In view of the shipper's statement, we find TP&W's contract allegations speculative at best. Thus, we find no merit to its contention that the Canton-Hollis segment has a GCV. This finding moots the need to resolve whether part of the Line should be valued using the GCV methodology. See October Decision, slip op. at 11 n.16.

2. Land Value. Other than the Wildman analysis discussed above, TP&W has submitted no evidence or argument in support of its contention that we erred in finding that it owned a fee interest in only 31.657 acres of the Line's right-of-way. Because we have granted KJRY's motion to strike the

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Wildman analysis, we will consider only TP&W's claim that we committed material error in accepting Higgs' appraisal methodology over the methodology used by Cecil.

***10** TP&W contends that Higgs presented an unacceptable corridor comparison and no appraisal. Specifically, TP&W contends that Higgs' corridor comparison is not a true ATF analysis and is not consistent with the methodology accepted by the Board in such cases as CSX Transportation, Inc.--Abandonment Exemption-- in LaPorte, Porter and Starke Counties, IN, STB Docket No. AB-55 (Sub-No. 643X) (STB served Apr. 30, 2004) (LaPorte) and Boston and Maine Corporation-- Abandonment--in Hartford and New Haven Counties, CT, STB Docket No. AB-32 (Sub-No. 8) (STB served July 1, 1998). For example, TP&W claims that the six comparable sales used in Higgs' analysis were too few; that they were not properly representative in that they occurred between 8 and 15 years ago, involved parcels that were at least 50-75 miles from the Line, included more than one rail corridor, and may not have involved abandoned rail properties or railroad transactions; and that they were not referenced or were improperly referenced to other comparable sales. Additionally, TP&W notes that it was KJRY's attorneys and not Higgs who adopted the 70% discount factor and applied the 4-year sell-off period that led to our finding that the Line has a total land value of $41,635.

On reconsideration, we agree with TP&W's contention that Cecil's analysis was more consistent with precedent and more credible than KJRY's analysis. Under Cecil's appraisal, which

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concluded that the bulk of the right-of-way was held in fee simple, the Line's real estate was valued at $2,863,173 using a 3-year sell-off period for 95% of the land. We will adjust this figure upwards to $2,946,245 to reflect a 4-year sell-off period for all of the land, which TP&W now accepts as more reasonable and which Golden used in his restatement of Cecil's appraisal. To develop a pro rata figure reflecting the portion of the right-of-way that we find to be held in fee, we must divide the $2,946,245 appraisal by 672, the claimed total fee acreage in the Line's right-of-way, to obtain a per-acre unit value of $4,384.29. Multiplying the $4,384.29 unit value by 31.657 acres (the total acreage we found TP&W to hold in fee) yields a total land value of $138,794.

3. Net Salvage Value. Instead of averaging the price of scrap steel, TP&W argues that we should have followed our recent decision in LaPorte, slip op. at 7-8, where we valued scrap steel using current market prices. The LaPorte decision, however, involved an offer of financial assistance (OFA), which requires the Board to set terms and conditions within 30 days of the OFA's filing date. See 49 U.S.C. 10904(f)(1). A feeder line proceeding under 49 U.S.C. 10907 involves a less abbreviated schedule. In this case, for example, the Application was filed in April 2003 but was not ruled upon until October 2004. Commodity prices are more likely to fluctuate widely over a longer time period, as demonstrated by the record here. It is appropriate when such fluctuations occur to average commodity prices over the length of the proceeding to protect sellers from dramatic price reductions and buyers from dramatic price increases. See October

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Decision, slip op. at 14.

***11** In the October Decision, we provided that TP&W could supplement the record with a composite monthly average unit price for reroll rail using AMM and (if available) Iron Age data for the April 2003-May 2004 time period. TP&W responded by appending to Gavin's verified statement a chart showing the AMM price for scrap steel and reroll rail as of the first day of each month from April 2004 through November 2004. KJRY replied and submitted price quotes on reroll rail from AMM and Iron Age for the first day of each month from April 2003 through May 2004.

Gavin's data do not correlate to the time period set out in our decision. They include only the last 2 months of the 14-month period we requested, and the data for one of those months (April 2004) are incorrect. Additionally, Gavin's data are not structured as a composite monthly average, are limited to AMM, and include no supporting documentation. KJRY's submission--which supports a higher price for reroll rail--was more responsive to our request; it covered the full 14-month time-period and included both AMM and Iron Age data with supporting documentation. KJRY gave the market prices for reroll rail as of the first day of each month and then calculated average AMM and Iron Age market prices of $173.21 and $176.86 per ton, respectively, for the full 14-month period. While we requested composite monthly averages, the data submitted by KJRY sufficiently satisfy the objective of our decision and will be accepted. Averaging the AMM and Iron Age market prices for reroll rail, as we did for scrap, yields a

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combined average price of $175.04 per ton and increases the Line's NSV by $127,828 to a total of $4,026,948.

4. Tax Credits. TP&W claims that, under section 245 of the American Job Creation Act of 2004, Pub. L. No. 108-357 (codified at 26 U.S.C. 45G), enacted on October 22, 2004, it is also entitled to be compensated for tax credits it will lose if forced to sell the Line. Section 245 provides that, for tax years 2005, 2006, and 2007, small (Class II and III) railroads are entitled to a tax credit of $3,500 per mile on a system-wide basis to the extent they make qualified investments ("expenditures . . . for maintaining railroad track (including roadbed, bridges, and related track structures) owned or leased as of January 1, 2005, by a Class II or Class III railroad") in those years of $7,000 per mile on a system-wide basis.

TP&W states that it owns or leases 283 miles of track, including siding and yard track, and as a result must spend $1,981,000 (283 multiplied by $7,000) in qualified investments to receive the maximum yearly tax credit of $990,500 (283 multiplied by $3,500). Asserting that it will have spent $2,096,553 in qualified investments in 2004, and will exceed that amount in 2005, 2006, and 2007, TP&W claims that it will be entitled to the maximum tax credit in each of the 3 years. Because the La Harpe-Hollis Line is 76 miles long and includes an additional 7.3 miles of side and yard track, for a total of 83.3 miles of track, TP&W claims that it will lose $291,550 in tax credits (83.3 miles multiplied by $3,500) in 2005 and a total of $874,650 for the 3-year

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period, as a result of this sale.

***12** Under 49 U.S.C. 10907(b)(1), we set the purchase price of a line at its constitutional minimum value, which is defined in 49 U.S.C. 10907(b)(2) as "not less than the net liquidation value of such line, or the going concern value of such line, whichever is greater." The Board, like the ICC before it, has historically and repeatedly in its regulations and decisions defined NLV as the value of the physical assets of a line at their highest and best nonrail use and has calculated NLV as the sum of the gross salvage value of rail and track materials, less removal and disposal costs, plus the value of the right-of-way real estate held in fee simple. The tax credits at issue here are not physical assets; they cannot be valued at their highest and best nonrail use, nor do they add value to assets that are being liquidated. They simply constitute a reduction in tax liability. To the extent they could be a consideration in computing constitutional minimum value, tax credits more likely would be a consideration in calculating GCV.

In any event, the tax credits for which TP&W seeks compensation here are speculative at best, as they depend on whether TP&W would actually spend the funds necessary to entitle it or its corporate parent to a tax credit, much less the maximum tax credit.

Request for Earlier Closing Date and Entry Order

In a letter filed on January 27, 2005, KJRY asks us to order TP&W immediately to allow KJRY to physically inspect the

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Line and to reschedule the closing to occur on or before February 11, 2005. KJRY also complained of TP&W's delay in accepting or rejecting its proffered trackage rights agreement for the Kolbe-Hollis segment, and attached a document mentioning the absence of "the diamond of Bushnell, Illinois." We address these matters in turn.

Physical Inspection. In a January 13, 2005 letter to us, TP&W stated that it "was willing to allow KJRY to inspect the line during the expected brief postponement [of the closing date] so that KJRY can determine what will be required for its track program." In a more recent letter to KJRY, however, TP&W declined KJRY's request for an inspection because KJRY had not formally accepted its earlier inspection offer and we had not specifically required an inspection. See attachment 2 to KJRY's January 27 letter.

We agree with KJRY that TP&W's new position represents an improper effort to delay closing as long as possible. A track inspection is critical to KJRY's ability to provide service safely to shippers. We will therefore order TP&W to provide KJRY with immediate physical access to the Line to permit an inspection.

Closing Date. KJRY convincingly argues that it has car orders for early February shipments by, and has entered into a transportation contract with, Farmers Elevator Company (Farmers), and that a closing in late February could cost KJRY the opportunity to win a contract for shipments over the line by another substantial agricultural shipper. KJRY also

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submitted letters from seven shippers in support of an earlier closing. To avoid any further delay in restoring needed service to willing shippers such as Farmers, and to avoid the loss of a second shipper, we will require that closing be effected on or before February 11, 2005, as KJRY now requests. The parties should be on notice that we will not entertain any further request to delay the closing.

***13** Trackage Rights Agreement. In light of the need for an imminent closing date, we will not consider requests to change the terms of the trackage rights agreement. The agreement was proposed on June 9, 2003, and approved by us in the October Decision. TP&W had ample opportunity to complain about any of the details in its Comments or on reconsideration. We direct the parties to try to resolve all trackage rights terms and reach agreement prior to the new closing date. TP&W's failure to resolve the terms of the trackage rights will be at its own risk. If KJRY accepts the new price we are setting here, we order TP&W to close on the transaction, even in the absence of a signed trackage rights agreement. If the parties are unable to agree, we would be available to resolve any remaining issue on the terms of the trackage rights.

Bushnell Diamond. TP&W has represented that BNSF Railway Company (BNSF), can restore the diamond crossing at Bushnell, IL, within 38 hours. Because this diamond crossing is needed for the movement of traffic over the Line, we expect that the carriers involved will fulfill their responsibilities to restore the Bushnell diamond on or before

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February 10, 2004 (the day prior to closing of this transaction). For this reason, a copy of this decision will be served on BNSF.

Summary. We reaffirm our finding in the October Decision that the public convenience and necessity permits the forced sale of the La Harpe-Hollis Line to KJRY. On reconsideration, we find that the 76-mile Line has an NLV of $4,165,742, based on an NSV of $4,026,948 and a land value of $138,794. Because this figure is well within the financial responsibility finding we previously made, KJRY will be directed to notify TP&W and the Board within 24 hours as to whether it wishes to proceed with the sale at this revised purchase price. We will further direct that, if KJRY elects to proceed, the parties shall close on the sale on or by February 11, 2005.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. TP&W's petition to waive the page limitation of 49 CFR 1115.3(d) is granted.

2. TP&W's request for oral argument is denied.

3. KJRY's motion to strike TP&W's petition for reconsideration is granted as to those portions of TP&W's

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legal argument that relate to the new title analysis prepared by Wildman, the Wildman title analysis, and Golden's new real estate appraisal, and denied in all other respects.

4. TP&W's petition for reconsideration is granted with respect to the land valuation and denied in all other respects.

5. The purchase price for the Line is revised to $4,165,742.

6. KJRY shall notify TP&W and the Board by telephone within 24 hours of the service of this decision if it wishes to proceed with this sale at this revised purchase price.

7. TP&W shall give KJRY immediate access to the Line for an inspection.

*14 8. The Bushnell diamond shall be restored on or before February 10, 2005.

9. Closing shall occur on or before February 11, 2005.

10. This decision is effective on its service date.

11. A copy of this decision will be served on BNSF Railway Company.

Vernon A. Williams

Secretary

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FN1. The Board also denied KJRY's request for a directed service order; ordered TP&W to identify within 10 days, which, if any, of the properties it claimed (in its stay petition) to have sold were included in its valuation of the Line's right-of-way, and to refrain from any such sales; and ordered TP&W to refrain from removing the Line's track, switches, and other materials or otherwise taking steps that would further increase the cost of restoring rail service.

FN2. See SF&L Railway, Inc.-Acquisition and Operation Exemption-Toledo, Peoria and Western Railway Corporation Between La Harpe and Peoria, IL, STB Finance Docket No. 33995 et al. (STB served Oct. 17, 2002), clarified (STB served Jan. 31, 2003) (where TP&W sought to sell the right to operate over, along with the rail, ties, and certain assets on, the 71.5-mile La Harpe-Mapleton line (La Harpe Line) to SF&L so that the line could be abandoned and salvaged); SF&L Railway, Inc.-Abandonment Exemption-in Hancock, McDonough, Fulton and Peoria Counties, IL, STB Docket No. AB-448 (Sub-No. 2X) (STB served Sept. 23, 2002) (where TP&W sought to substitute itself for SF&L in the latter's effort to abandon the La Harpe Line).

FN3. TP&W sold the 12.1-mile westernmost portion of the West End between Lomax and La Harpe to KJRY in December 2001. See Keokuk Junction Railway Co.-Acquisition and Operation Exemption-West End of the Toledo, Peoria and Western Railway Corporation, STB Finance Docket No. 34143 (STB served Jan. 11, 2002), 67 FR 1535 (Jan. 11, 2002).

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Fed. Carr. Cas. P 37185, 2005 WL 281909 (S.T.B.)
(Cite as: Fed. Carr. Cas. P 37185, 2005 WL 281909 (S.T.B.))

FN4. TP&W accesses the West End using trackage rights over UP between Hollis and Peoria, IL, and over Peoria and Pekin Union Railway Company between Peoria and East Peoria, IL.

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Westlaw.

2004 WL 2619769 (S.T.B.)
(Cite as: 2004 WL 2619769 (S.T.B.))

2004 WL 2619769 (S.T.B.)

Surface Transportation Board (S.T.B.)

KEOKUK JUNCTION RAILWAY COMPANY-FEEDER LINE ACQUISITION-LINE OF TOLEDO PEORIA AND WESTERN RAILWAY CORPORATION BETWEEN LA HARPE AND HOLLIS, IL

Decided: October 28, 2004

SURFACE TRANSPORTATION BOARD DECISION

STB Finance Docket No. **34335**

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

***1** The Surface Transportation Board grants the feeder line application of Keokuk Junction Railway Company to acquire a 76-mile line of railroad owned by the Toledo, Peoria & Western Railway Corporation.

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APPENDIX C 29

Keokuk Junction Railway Company (KJRY), a Class III railroad controlled by Pioneer Railcorp (Pioneer), a noncarrier holding company, asks us to use our authority under 49 U.S.C. 10907 to order the Toledo, Peoria & Western Railway Corporation (TP&W) to sell a 76-mile rail line in western

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central Illinois to KJRY. The line (referred to here as the La Harpe-Hollis Line or the Line) runs eastward from a connection to KJRY's line at La Harpe, IL (milepost 194.5), to Hollis, IL (milepost 118.5), where it connects with a line of the Union Pacific Railroad Company (UP). TP&W is a Class III railroad controlled by RailAmerica, Inc. (RailAmerica), a noncarrier holding company. A map depicting the Line is attached as Appendix A.

BACKGROUND

The 71.5-mile portion of the Line between milepost 194.5 near La Harpe and milepost 123.0 at Mapleton (La Harpe Line) has been the subject of extensive prior litigation before the Board. After operating the La Harpe Line for many years, TP&W sold the right to operate over it, along with the rail, ties, and certain improvements on it, to SF&L Railway, Inc. (SF&L).[FN[FN1]] The sale was later challenged, and, upon determining that SF&L had acquired the La Harpe Line with the improper intent to abandon and salvage it, the Board directed SF&L to reconvey the line to TP&W. SF&L Railway, Inc.-Acquisition and Operation Exemption-Toledo, Peoria and Western Railway Corporation Between La Harpe and Peoria, IL, STB Finance Docket No. 33995 (STB served Oct. 17, 2002) (SF&L I) clarified (STB served Jan. 31, 2003) (SF&L II). Pursuant to the Board's directive, TP&W reacquired the La Harpe Line on February 10, 2003.

While the Board was considering administrative appeals of the SF&L I decision, KJRY sought authority under 49 U.S.C. 11123 and 49 CFR 1146 to provide temporary alternative rail

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service over the La Harpe Line. The Board denied that request based on TP&W's assurances that it would resume operations over the La Harpe Line once it reacquired that line. Keokuk Junction Railway Company-Alternative Rail Service-Line of SF&L Railway, Inc., STB Finance Docket No. 34310 (STB served Feb. 14, 2003).

***2** KJRY then filed this "feeder line" application on April 9, 2003, for a forced sale of the Line under 49 U.S.C. 10907.[FN[FN2]] That provision directs the Board to require a railroad to sell a rail line, which the incumbent railroad either has slated for abandonment or is not adequately serving, when a financially responsible person applies to buy the line at a price not less than the constitutional minimum value. Constitutional minimum value is the higher of the line's going concern value (GCV) (i.e., its value as a viable business) or its net liquidation value (NLV).

KJRY's initial application was found to be deficient (in a decision served on May 9, 2003). On June 9, 2003, KJRY filed an amended application, styled a "supplement," in which it offered (at 21) to purchase the La Harpe-Hollis Line, together with a connecting segment known as the Mapleton Industrial Spur and Wye Facilities (the Spur), for an estimated GCV of $3,461,434. The 2.5-mile Spur connects to the La Harpe-Hollis Line at milepost 121.5 at Kolbe, IL, and serves the Mapleton Industrial Park, the source of the largest concentration of traffic on TP&W's system. KJRY alternatively offered to purchase only the La Harpe-Hollis Line, for an estimated NLV of $3,284,605, leaving TP&W as the exclusive owner and operator of the Spur. Under that

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alternative proposal, to afford TP&W access to the Spur, KJRY would grant TP&W, at no fee, trackage rights over the Line between Hollis and Kolbe (a distance of about 3 miles).

The Board accepted KJRY's amended application, subject to KJRY filing an environmental report in compliance with 49 CFR 1105.7, and adopted a procedural schedule for filing competing applications, verified statements, comments, and verified replies, in a decision served on July 9, 2003. TP&W and the United Transportation Union-Illinois Legislative Board (UTU-IL) appealed that decision and requested that we either reject or require KJRY to clarify the amended application. Those appeals were denied and a new procedural schedule was set in a decision served on September 26, 2003.

In the meantime, KJRY filed a second petition for authority to provide temporary alternative rail service, this one on the La Harpe-Hollis Line. The Board denied that petition because the alleged service inadequacy was rate-based and rate disputes do not "constitute service disruptions or inadequacies within the meaning of 49 U.S.C. 11123." Keokuk Junction Railway Company-Alternative Rail Service-Line of Toledo, Peoria and Western Railway Corporation, STB Finance Docket No. 34397, slip op. at 6 (STB served Oct. 31, 2003) (KJRY-Alt. Serv.-TP&W).

TP&W and UTU-IL filed verified statements and comments (Comments) in opposition to the feeder line application on October 16, 2003. KJRY filed a verified reply (Reply) on November 7, 2003. In its Reply, KJRY withdrew its request to acquire the Mapleton Spur. KJRY now seeks to acquire

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only the La Harpe-Hollis Line.

DISCUSSION AND CONCLUSIONS

The Public Convenience and Necessity Determination

*3 KJRY seeks to acquire this rail line under the public convenience and necessity standard of 49 U.S.C. 10907(b)(1)(A)(i). To find a line eligible for sale under that standard, the Board must find, under 49 U.S.C. 10907(c)(1), that:

> (A) the rail carrier operating such line refuses within a reasonable time to make the necessary efforts to provide adequate service to shippers who transport traffic over such line;
>
> (B) the transportation over such line is inadequate for the majority of shippers who transport traffic over such line;
>
> (C) the sale of such line will not have a significantly adverse financial effect on the rail carrier operating such line;
>
> (D) the sale of such line will not have an adverse effect on the overall operational performance of the rail carrier operating such line; and
>
> (E) the sale of such line will be likely to result in improved railroad transportation for shippers that transport traffic over such line.

KJRY in its application contends that it has met the five criteria and therefore its application should be granted. TP&W, by contrast, argues that KJRY has failed to show that

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any of these five criteria are met here.

(A) Refusal to provide adequate service.

TP&W has provided no service over the Line since February 10, 2003, when it reacquired the La Harpe Line pursuant to our order. TP&W claims that it has been ready, willing, and able to provide rail service since then, but that it has received no requests for service. However, the record here clearly demonstrates that shippers want service, while TP&W has actively discouraged use of the Line west of Kolbe.

As KJRY points out, the September/October 2003 edition of the Official Railway Guide (Railway Guide)[FN[FN3]] does not show any TP&W interchanges on the Line west of Mapleton.[FN[FN4]] Similarly, the TP&W website does not reference the portion of TP&W's system west of Mapleton.[FN[FN5]] Moreover, the map that TP&W continues to display on its website shows the western terminus of its system to be Mapleton.

The record further indicates that TP&W's rate practices demonstrate that it is not interested in marketing or offering service for the Line. TP&W's lumber, fertilizer, and scrap metals tariffs do not include rates to points west of Mapleton.[FN[FN6]] Moreover, unlike UP and The Burlington Northern and Santa Fe Railway Company (BNSF), TP&W has repeatedly refused to supply rate factors to KJRY to permit it to construct rates for through movements over the Line. And for the local services for which TP&W nominally provides rates, it has raised its rates on the Line to

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prohibitively high levels. For example, when TP&W reacquired the Line, Farmers Elevator Company (Farmers) ordered 18 cars from TP&W to ship corn from Sciota, IL, to La Harpe for interchange to KJRY. Farmers canceled the order after being quoted TP&W's rate.[FN7]

The record shows that other shippers have had similar experiences. In a letter dated April 9, 2003, a representative of Colusa Elevator Company (Colusa) stated that "the rates being quoted for any grain transit east are currently 3-4 times higher than was quoted before the SF&L debacle. In essence the rates have stopped any business we want to do."[FN8] United Paving Construction, Inc., the operator of an on-line transloading facility, in a letter filed August 11, 2003, complained that its off-line supplier, Rogers Group/Newton County Stone Company, "indicated ... reluctance by TP&W to quote rates or provide service. When those rates finally did come through, they were clearly unreasonable as compared to previous years."[FN9] Roquette America, Inc. (Roquette), in a letter dated April 4, 2003, stated that "TP&W has not responded in a timely manner to requests for rates and when they have replied, rates have not been competitive. One example was a rate quote of $705 for a move that SF&L charged $275 which is $75 higher than the rate we had received from the TP&W prior to the SF&L's purchase of this portion of track."[FN10]

***4** Finally, TP&W's previous history concerning this Line - including its failed effort to sell the La Harpe Line to SF&L so that SF&L could abandon and salvage it,[FN11] and TP&W's subsequent unsuccessful effort to substitute itself for

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SF&L in SF&L's notice of exemption to abandon the La Harpe Line - underscore TP&W's failure to recognize and meet the service demands for the Line.[FN12]

Claims that rates are too high are not generally considered in cases brought under 49 U.S.C. 11123, which is limited to addressing short-term emergencies on a temporary basis. Section 10907, however, focuses on longer-term concerns, and its legislative history supports the use of the section where there is evidence that an incumbent has engaged in conduct or charged rates in an effort to drive traffic away from a line. The Conference Report accompanying the Staggers Rail Act of 1980 states that section 10907 is to "[provide], through acquisition, a viable alternative to poor service or total abandonment." H.R. Rep. No. 1430, 96th Cong., 2d Sess. 125 (1980). The House report, in discussing a provision in the House version that would have required railroads to seek buyers for lines that were candidates for abandonment, explained that: "The [Board] may find that a rail carrier applying a [rate increase] ... is de facto abandoning the surcharged line and require the abandoning carrier to attempt to find a purchaser for the line." H.R. Rep. No. 1035, 96th Cong., 2d Sess. 71 (1980). Although that provision was modified - to remove any onus on the owning carrier to find a new operator - it is clear that Congress envisioned an incumbent's rates and practices to be potentially relevant to a feeder line application.

Thus, it is appropriate that we consider the evidence tendered by KJRY, and by the shippers supporting its application, that TP&W raised rates to discourage shippers

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from tendering traffic.

In sum, we find that TP&W has not made the necessary efforts to provide adequate service to shippers on the Line.

(B) Inadequacy of transportation.

Five of the six shippers located on the Line - Farmers; Blandinsville Elevator; Hitchcock Scrap Yard, Inc.; West Central FS, Inc./Bushnell; and West Central FS, Inc./Sciota - regard TP&W's service as inadequate and support KJRY's application. The sixth on-line shipper, Archer Daniels Midland (ADM), diverted all of its traffic to truck and is not expected to use the Line in the future.

Five of the 10 overhead shippers - Roquette, Colusa, Central Iron & Metals, La Harpe Elevator, and Elkem Carbon-Keokuk (formerly Midwest Carbide) - also criticize TP&W's rates and service as inadequate. A sixth overhead shipper, Griffin Wheel (Griffin), a supplier of materials for UP, rerouted its traffic via Fort Madison, IA, out of concern that regular train operations over the Line would no longer be continued. The five overhead shippers that have not complained about TP&W's service - CF Industries, Inc., Caterpillar Foundry, Goldschmidt, SPI Polyoils, and Lonza Group - are located on the Mapleton Spur which TP&W will retain and thus are not part of the application.

***5** Accordingly, on this record we find that transportation is inadequate for a majority of the shippers that transport traffic over the Line.

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(C) Financial effect of the sale on TP&W.

TP&W claims that it would suffer a significant adverse financial effect if forced to sell the Line. It argues that KJRY has offered far less than the Line's market value and that TP&W's financing arrangements, if it is forced to sell the Line, would require it to supply replacement collateral or use cash to pay down debt, which would reduce its liquidity. Additionally, TP&W contends that the proposed trackage rights over the 3-mile portion of the Line necessary to access the Spur would foist on TP&W half of the cost of operating the Line, most of which would not be incurred absent the proposed sale to KJRY.

These arguments lack merit. Under 49 U.S.C. 10907(b)(1), we cannot and would not set the sale price at less than fair market value. Moreover, the charges to TP&W under the proposed trackage rights agreement for the most part would be either nominal (e.g., the $1 annual fee for the trackage rights) or relatively minor and related to specific services KJRY might be asked to perform if TP&W does not carry out its operations in a responsible way (e.g., the charge that would apply if KJRY's help is requested for TP&W trains that derail on the Line, the fees that would apply if KJRY must provide pilots or rules examiners for TP&W crews, and charges to replace rulebooks, switch keys, or timetables that are lost by TP&W employees). And the one charge that would be substantial - the requirement that KJRY and TP&W share equally the cost of constructing any new connecting track or facilities that might be needed on the 3-mile Hollis-

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Kolbe segment of the Line - would apply only if TP&W continues to park trains on the 3-mile segment of the Line or engage in other practices on that segment that would obstruct the Line's use.[FN[FN13]] Thus, it is largely within TP&W's ability to avoid any substantial charges for the trackage rights.

TP&W claims that all of the highly profitable Mapleton Spur traffic will be lost if KJRY's application is granted. TP&W cites to the verified statement of Warren C. Wilson, UP's Senior Manager for Rail Line Planning, to support this claim. But Wilson's statement only addressed KJRY's now-withdrawn request to acquire the Mapleton Spur. (Wilson stated that if TP&W were to acquire the Spur, UP would exercise the trackage rights it has over TP&W to serve Spur shippers directly, rather than replacing TP&W with KJRY as the Spur's switching railroad or sorting Spur traffic for both KJRY and TP&W.)[FN[FN14]] KJRY's amended application excludes the Spur, TP&W will continue to be the only switching carrier serving the Spur, and UP will have no need to sort Spur traffic. Thus, there is no reason to believe TP&W would lose any Spur revenue.

We conclude that TP&W should benefit financially from the proposed sale. It would receive fair market value for the Line, which will be substantially more than the $2.18 million it received from SF&L in 2000 for the sale of the operating easement, rail, ties, and improvements of the slightly shorter LaHarpe Line. In addition, TP&W will retain ownership of the highly profitable Mapleton Spur, it will not have to compete with KJRY for Spur traffic, and it will have virtually cost-free trackage rights over the 3-mile segment of the Line

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necessary to access the Spur without having to contribute to the segment's upkeep and maintenance. Finally, TP&W's traffic volume may expand with KJRY-routed shipments moving over the Line.

(D) Effect of the sale on TP&W's operational performance.

***6** Even though it has spent years trying to remove the La Harpe Line from the national railroad system, TP&W now claims that the forced sale of the slightly longer La Harpe-Hollis Line would adversely affect its overall operational performance, reducing the level of service it would be able to provide and increasing the rates it would have to charge. But TP&W conducts no operations, and has not provided service, over the 71.5-mile La Harpe Line for some time. Moreover, TP&W will have trackage rights over the 3-mile segment of the Line necessary to access the Mapleton Spur. Thus, we do not see how the Line's sale could have a significant adverse operational effect on TP&W.

(E) Improved rail transportation for shippers.

The shippers that support KJRY's application all used the Line to tender or receive shipments before it was sold to SF&L, and many have tried unsuccessfully to obtain service since then. These shippers support the forced sale of the Line to KJRY. KJRY has expressed a strong desire to restore operations over the Line, and this application bears witness to its determination to do so.

TP&W accuses KJRY of being an unsafe operator, citing an

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incident in which the Federal Railroad Administration (FRA) and the Illinois Commerce Commission (ILCC) became involved. According to TP&W, as a result of an unauthorized operation by KJRY, FRA and ILCC threatened to bar KJRY and Pioneer from operating railroads and to force them to divest their railroad assets for safety reasons. KJRY provides a different account of the incident and maintains that it is an experienced and safe operator that has had no unduly negative experience with FRA or ILCC. KJRY also claims that more recent FRA data establish that it has a very positive safety record.

Although we take safety considerations into account in carrying out the Interstate Commerce Act, FRA is the agency primarily charged with safety regulation. FRA, which is familiar with the alleged incident, has not suggested to us that KJRY is unfit to operate or that it should not be authorized to take over the Line. Accordingly, TP&W's unsubstantiated safety allegations do not provide cause to deny this application.

UTU-IL also argues that the sale of the La Harpe-Hollis Line would not result in improved transportation for shippers, claiming that TP&W's continued operation of the Line "was found necessary to preserve the competitive balance between carriers, shippers, and communities" in Burlington Northern et al.-Merger-Santa Fe Pacific et al., 10 I.C.C.2d 661 (1995) (BN/SF Merger) and Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996) (UP/SP Merger). According to UTU-IL, TP&W has the connections in the Peoria area and further east that are important to maintaining the required competitive

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balance, and for which KJRY cannot provide an adequate substitute.

*7 UTU-IL misconstrues the merger concerns of the Interstate Commerce Commission (ICC) and the Board as applying to eastward movements through Peoria. In fact, the ICC determined in BN/SF Merger that the settlement agreement negotiated by BNSF and the former Southern Pacific Transportation Company (SP) would, among other things, permit SP to interchange traffic with TP&W on the Line at Bushnell (milepost 170.5) and thus preserve intramodal competition for the westward movements of Keokuk-area shippers. Prior to the merger, KJRY-routed shipments moved west in single-line service via the former Burlington Northern Railroad Company (BN) or in interline service via TP&W at La Harpe and the former Atchison, Topeka and Santa Fe Railway Company at Bushnell. After the merger, KJRY-routed shipments were expected to move west in single-line service via BNSF or in interline service via TP&W at La Harpe and SP (now UP) at Bushnell. See BN/SF Merger, 10 I.C.C.2d at 778. (In UP/SP Merger, the Board determined that the combined UP and SP would accept and fulfill the terms of the BNSF-SP settlement agreement with respect to Bushnell and, as a result, there was no need for additional conditions in this regard. See UP/SP Merger at 279-280 and 467.)

KJRY's operation of the La Harpe-Hollis Line will not undercut the merger-related conditions imposed by the ICC and the Board to preserve routings for the western movements of KJRY-routed shipments. No shippers have appeared on

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this record to suggest otherwise. Moreover, KJRY's purchase of TP&W's La Harpe-Lomax line, which included trackage rights over BNSF, see Keokuk Junction Railway Co.-Acquisition and Operation Exemption-West End of the Toledo, Peoria and Western Railway Corporation, STB Finance Docket No. 34143 (STB served Jan. 11, 2002), allows KJRY to interchange westward routed traffic with UP at Fort Madison, a more direct connection.

In any event, TP&W has not been providing service over most of the Line for some years and this is unlikely to change in the foreseeable future. The trackage rights agreement would ensure that TP&W can continue to serve the Mapleton Spur and provide whatever overhead operations it provides today. Thus, it is hard to see how this transaction could adversely affect competition.

Finally, TP&W argues that KJRY would be unable to serve the Line profitably, and hence would be unable to provide improved service. The financial feasibility of KJRY's proposal is discussed below, in connection with our analysis of the applicant's financial responsibility. As discussed there, we find KJRY's proposed purchase feasible.

Accordingly, we find that granting KJRY's application would lead to improved service for shippers on the Line.

Summary. KJRY's evidentiary showing, taken as a whole, shows that KJRY has satisfied each of the five statutory criteria and clearly supports a finding that the public convenience and necessity permit the sale of the La Harpe-

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Hollis Line to KJRY. The fact that no service has been provided on most of the Line since the La Harpe Line was reacquired by TP&W, notwithstanding the demand for service on the part of the Line's shippers, provides strong support for this finding. Indeed, TP&W's entire course of conduct with respect to the Line and the La Harpe Line has been contrary to the behavior that can be expected of a carrier ready and willing to provide rail service. KJRY, on the other hand, maintains that it can provide rail service at competitive rates and is eager to do so. The evidence supports our finding that the sale of the Line would not have a significant adverse effect on TP&W's operations or its financial condition and that the proposed sale would be likely to result in improved transportation for the shippers that have used, and wish to resume using, the Line. Accordingly, under section 10907, we must direct the sale of the Line to KJRY.

Valuation

***8** Under 49 U.S.C. 10907(b)(1), we set the purchase price of a line at its constitutional minimum value, which is defined in 49 U.S.C. 10907(b)(2) as "not less than the net liquidation value of such line, or the going concern value of such line, whichever is greater." KJRY contends that in this case the higher value is the NLV, which it now claims (in its Reply) is $3,321,745.[FN[FN15]] TP&W contends that the Line has a constitutional minimum value ranging from $7,653,906 (based on an NLV of $6,316,951 for the 71.5-mile segment Western Segment and $1,336,955 for the 4.5-mile segment Eastern Segment) to $17,059,779 (based on an NLV of $9,218,759 for the Western Segment and a GCV of

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$7,841,000 for the Eastern Segment). As discussed below, we conclude that the Line has a constitutional minimum value of $3,940,756. A detailed summary of our valuation restatement is set out in Appendix B of this decision.

Valuation Standard. TP&W and KJRY agree that the traffic originating or terminating on the Western Segment is inadequate to give it a GCV that is higher than NLV, and it is not apparent how the Eastern Segment, without the Mapleton Spur traffic, could have a GCV higher than NLV. The Eastern Segment neither originates nor terminates traffic; its only value to TP&W is in the access it provides to the traffic-heavy Mapleton Spur. With TP&W retaining ownership of, exclusive access to, and all the revenues from, the Mapleton Spur, and receiving virtually cost-free trackage rights to continue serving the Spur, the Eastern Segment cannot have a separate, higher GCV. Thus, we need only calculate the NLV of the Line, which consists of the salvage value of the physical assets and the value of the land.[FN[FN16]]

1. Salvage Value. For the Western Segment,[FN[FN17]] KJRY estimated the quantity and weight of track and siding and the quantity of "other track material" (OTM) using a list of track materials TP&W prepared in 1998 and subsequently updated in connection with the sale of the La Harpe Line to SF&L. According to KJRY, the Western Segment contains 71.3 miles of main-line track of various weights - from 90-lb. jointed rail (Jtd.) to 131-lb. continuous welded rail (CWR) - and 8.7 miles of 80-lb. siding and auxiliary track. KJRY obtained several price quotes, ranging from $250 to $400 per ton for "relay" rail,[FN[FN18]] from secondhand rail suppliers; it

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then deducted the estimated cost of removing, picking up, sorting, and transporting the rail to obtain a net salvage value (NSV) of between $100 and $160 per ton. KJRY selected $140 per ton as the average NSV for all grades of track (13,081 tons) and $40 per ton as the NSV for scrap (2,077 tons), for an estimated rail NSV of $1,914,420. The NSV for OTM was estimated at 20% of the NSV for the rail ($1,914,420 x 0.20 = $382,884), yielding an estimated NSV for track and OTM for the Western Segment of $2,297,304.

***9** Also with respect to the Western Segment, KJRY estimated that there are 3,300 ties per mile on the main-line track and 2,700 ties per mile on the sidings; that 40% of the main-line ties are reusable as railroad ties, 10% are reusable for landscaping, and the remaining 50% are not reusable; and that 10% of the siding ties are reusable as railroad ties, 10% are reusable for landscaping, and the remaining 80% are not reusable. Using salvage values of $7 per tie for rail use and $3 per tie for landscape use and a cost of $3 per tie to remove and dispose of non-usable ties, KJRY estimated an NSV of $343,308 for ties. KJRY estimated an NSV of $348,221 for ballast, based on an estimated 348,221 cubic yards of ballast with an average salvage value of $1 per ton, and an NSV of $0 for bridges and buildings.

Combining the NSV of the rail, OTM, ties, and ballast, KJRY obtained a total NSV for the Western Segment of $2,988,833. KJRY then prorated the total NSV of the Western Segment to obtain a unit value per mile, which it multiplied by 4.5 miles to yield a total NSV for the Eastern Segment of $195,772. The result was a combined NSV (without real

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estate) of $3,178,261 for the entire 76-mile La Harpe-Hollis Line.

TP&W's NSV analysis was prepared by Mark D. Garvin, Chief Engineer for the railroads controlled by TP&W's parent company (RailAmerica). Using TP&W's most recent track charts and a physical inspection of the Line made by hi-rail on September 8 and 9, 2003, Garvin valued the Western Segment's rail, OTM, turnouts, and crossing signals at $5,155,509. According to Garvin, the Western Segment contains 77.46 miles of various weight rail - from 70-lb. Jtd. to 131-lb. CWR. He divided the rail into three qualities: (1) relay; (2) reroll (rail that is one grade better than scrap and is used for making fence posts or "rebar"); and (3) scrap. Based on "recent sales in the local western Illinois area,"[FN[FN19]] he valued the relay at $280 to $450 per ton, the reroll at $158 per ton, and the scrap at $102 per ton, for a total of $4,028,574. Additionally, he valued the OTM at $983,094 (relay at $185 per ton and scrap at $110 per ton), the crossing signals at $72,000 (36 signals at $2,000 each), and the turnouts at $71,841 (20 relay turnouts at $3,000-$3,500 each and 10 scrap turnouts at $110 per ton).

Using the same procedure, Garvin valued the Eastern Segment's rail, OTM, turnouts, and crossing signals at $446,772. According to Garvin, the Eastern Segment contains 4 miles of 115-lb. Jtd. relay rail valued at $307,648 ($400 per ton) and 0.5-mile of 115-lb. Jtd. reroll rail valued at $13,563 ($158 per ton), for a total of $321,211. Additionally, Garvin valued the OTM at $70,097 ($185 per ton), the crossing signals at $6,000 (3 signals at $2,000 each), and the turnouts

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at $49,464 (14 relay turnouts at $3,000-$3,500 each and 5 scrap turnouts at $110 per ton).

TP&W accepted KJRY's tie and ballast valuation of $691,529 for the Western Segment and prorated it on a per-mile basis between the Western and Eastern Segments. This resulted in an understatement of that valuation because the proration was used to divide the $691,529 between the Western and Eastern Segments and not to develop a separate valuation for the Eastern Segment. When properly prorated, the tie and ballast valuation of the La Harpe-Hollis Line is $735,355 ($691,529 for the Western Segment and $43,826 for the Eastern Segment), yielding a total TP&W valuation before salvage costs are deducted of $6,293,285 ($5,808,574 for the Western Segment and $484,711 for the Eastern Segment).

***10** Based on price quotes from recent bids in the area, Garvin estimated that it would cost $60 per ton to dismantle CWR, $45 per ton to dismantle Jtd. rail, $49,000 to remove the 49 relay turnouts, $39,000 to remove the 39 signals, $15 per ton for shipping to Chicago, IL, and $84,000 to restore 84 crossings. Using these costs, he calculated that it would cost $1,502,553 to salvage the Line ($1,397,654 for the Western Segment and $104,899 for the Eastern Segment), and he estimated that the Line has a total NSV (without real estate) of $4,790,733 ($4,410,920 for the Western Segment and $379,813 for the Eastern Segment).

On March 17, 2004, TP&W filed a petition to supplement the record, which included a verified statement and revised

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valuation charts prepared by Garvin. TP&W claimed that the price of steel had increased by approximately 110% since October 2003, when it filed its Comments. According to Garvin, the scrap steel that he had priced at $110 per ton was now selling for $230 per ton. His revised valuation charts updated the unit prices for relay, reroll, and scrap rail and OTM, yielding a revised total NSV (without real estate) of $5,866,930 ($5,452,270 for the Western Segment and $414,660 for the Eastern Segment).

In a reply filed on March 29, 2004, KJRY argues that TP&W's supplemental petition should be rejected, as the record has closed. Alternatively, KJRY argues that Garvin's revised valuation charts lack verifiable support from an independent source and in any event do not represent anything more than a temporary market fluctuation. KJRY also questions the reliability of the unit prices in the revised valuation charts. For example, KJRY observes that, while TP&W claims to have increased its $110 per ton price used for scrap OTM to $230 per ton, TP&W actually increased its $102 per ton price used for scrap rail to $230 per ton and increased its $110 per ton price used for scrap OTM to $240 per ton. KJRY contends that there are other unexplained inconsistencies in the revised valuation charts as well. It points out that the price used for scrap rail was increased by 118%, whereas the price used for scrap OTM was increased by 125%; the price used for reroll was increased by 63%; the prices used for relay were increased from 4% to 20% for various weights of Jtd. and CWR but were unchanged for 115-lb. Jtd. and CWR; the price used for relay OTM was increased by 35%; and the price used for relay turnouts was

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unchanged.

On June 8, 2004, KJRY filed a petition to supplement the record, if TP&W's supplemental petition is not rejected as untimely, to introduce evidence that the price of steel scrap had dropped dramatically since TP&W's supplemental petition was filed. KJRY submitted copies of two lists of scrap iron and steel prices published by American Metal Market (AMM), a daily publication for the metals and recycling industries. The lists show that between March 8 and June 7, 2004, the delivered-to-Chicago price of No. 1 heavy melt scrap iron and steel declined by $75, from $255 to $180 per gross ton, and that the delivered-to-Chicago price of reroll declined by $30, from $260 to $230 per gross ton.

*11 TP&W filed a reply on June 28, 2004, objecting to KJRY's supplemental petition. TP&W also submitted a list from the June 24, 2004 edition of AMM, which it claims shows that the price of scrap iron and steel has begun to rise again and that the price of reroll has continued to rise since TP&W's supplemental petition was filed.

Our valuation relies primarily on the data supplied by TP&W. TP&W's valuations are based on current track charts, recent price quotes, and a physical inspection of the Line, whereas KJRY's valuations are based on older data, averages, and estimates. Moreover, in our valuation we reflect increases in the price of scrap iron and steel. See CSX Transportation, Inc.- Abandonment Exemption-in LaPorte, Porter and Starke Counties, IN, STB Docket No. AB-55 (Sub-No. 643X) (STB served Apr. 30, 2004) (CSX Aband. at 7-8). However, in

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view of the recent volatility in the scrap iron and steel and reroll markets and the time that has elapsed since this case was filed, it would not be appropriate to select a single date for the purpose of pegging a price for these commodities. Rather, we average the price of scrap over the time period involved. See, e.g., Chicago and North Western Transportation Company-Abandonment Between Marshalltown (Powerville) and Cedar Falls Junction and Between Hicks and Dike-in Marshall, Tama, Grundy and Blackhawk Counties, IA, Docket No. AB-1 (Sub-No. 211) (ICC served Dec. 7, 1988) (average used to calculate opportunity costs where scrap prices had reached the high end of the trading range); Norfolk and Western Railway Company-Abandonment Between New Castle and Rushville, in Henry and Rush Counties, IN, Docket No. AB-10 (Sub-No. 11) (ICC served Feb. 11, 1983) (average used to establish a purchase price where scrap prices had become depressed).

Our valuation uses a unit price for scrap steel of $157.16 per ton, the composite monthly average for No. 1 heavy melt steel scrap from April 2003 (the month the feeder line application was filed) through July 2004 (the last month of available data). As shown in Appendix C, this composite monthly average is based on the Mineral Industry Surveys for Iron and Steel Scrap of the United States Geological Survey, which in turn is based on aggregated monthly data from AMM and Iron Age, another trade publication.

Although similar data for reroll shipped to Chicago seems to exist in AMM, it is not available to us. As a result, our valuation relies on the unit values submitted by TP&W in its

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original valuation charts. However, TP&W may supplement the record, within 30 days from the service date of this decision, with a composite monthly average unit price for reroll using AMM and, if available, Iron Age data, for the April 2003-May 2004 time period. If TP&W elects to do so, KJRY will then have 10 days to file a reply. The time period for KJRY to accept or reject the terms of sale will be adjusted accordingly.

***12** Our valuation relies on the unit values for relay rail and OTM that TP&W submitted in its original valuation charts. These unit values, and the unit values for reroll and relay turnouts, must be adjusted, however, because (unlike the AMM and Iron Age figures) they are based on retail, rather than wholesale, prices, and TP&W has not shown that the relay would be used on a specific project at a particular time and location to save it the cost of purchasing similar relay at retail prices. Thus, we reduce the retail price by 15% to eliminate the retail profit component, and by 5% to eliminate inventory costs. See, e.g., CSX Aband. at 8-9; SF&L Railway, Inc.-Abandonment Exemption-in Ellis and Hill Counties, TX; Request to Set Terms and Conditions, Docket No. AB-448 (Sub-No. 1X) (STB served July 30, 1996) at 18 (retail prices for track materials reduced by 20% to reflect wholesale prices); R. S. Means, Heavy Construction Cost Data at 8 (01310-620-0400) (17th ed. 2002).

We use KJRY's tie and ballast valuation, which TP&W has not disputed (even though TP&W used a slightly lower number to develop its estimates), but reduce it to $735,051 to correct for proration errors.

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Because the Line was in existence prior to the construction of the roads and highways that cross it, we cannot accept TP&W's $78,000 crossing signal valuation. Absent evidence to the contrary, we assume that the State of Illinois and/or local highway authorities paid for the crossing signals and their installation, not TP&W or its predecessors. See 49 CFR 1201.2-17(b). Similarly, our valuation excludes the $39,000 TP&W included for crossing signal removal. Because we assume that the State of Illinois and/or local highway authorities paid for the crossing signals and their installation, we also assume, absent evidence to the contrary, that the State and/or local highway authorities, and not TP&W, would be responsible for their removal.

TP&W's salvage cost estimate is disputed by KJRY only to the extent it does not include bridge removal and environmentally sound scrap tie disposal costs. There is no evidence, however, that any bridges would require removal and what the removal costs would be. Nor is there any evidence on the cost of chipping and burning the scrap ties in an environmentally suitable manner. Thus, our valuation does not include bridge removal or additional scrap tie disposal costs.

In sum, we find that the La Harpe-Hollis Line has a total NSV of $3,899,121.

2. Land Value. Lacking sufficient information on the quantity of land in the right-of-way or the quality of TP&W's interest in it, KJRY assumed that TP&W has a fee interest in

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50% of the land and that the right-of-way of the Western Segment has a value of $100,000. KJRY then valued the right-of-way of the Eastern Segment, on a pro rata basis, at $6,336.

TP&W's land valuation was performed by Todd N. Cecil, RailAmerica's Vice President of Real Estate, who inspected the entire 76-mile right-of-way on the ground and by air between August 12 and 14, 2003. He valued the right-of-way both as an assembled rail transportation corridor and, alternatively, as separate, unrelated parcels of non-rail real estate (piecemeal).

***13** For his assembled corridor valuation, Cecil divided the right-of-way into 294 land parcels, to reflect adjacent zoning and land use patterns. Using an "across the fence" analysis,[FN[FN20]] he identified 54 comparable properties in the vicinity of the Line that were sold in the recent past. He increased their sale price by 5% per year to account for the time that elapsed since their sale, and made further upward adjustments to account for differences in location and topography between the comparable parcels and the parcels being valued. Cecil disregarded reversionary interests that would vest upon liquidation of the property, normally accounted for in an NLV analysis, because his methodology assumed that the right-of-way would be sold for continued rail service. Similarly, he did not reduce the value of the parcels to account for easements for road and street rights-of-way. Nor did he make any deductions for size, unusual shape (long and narrow), or access problems that could detract from the use and value of the properties.

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Cecil divided the (upwardly adjusted) property values by their acreage to obtain their unit value per acre, which he multiplied on a pro rata basis to value the corresponding corridor parcels.[FN[FN21]] This analysis yielded an assembled rail corridor land value of $5,579,145 ($4,006,532 for the Western Segment and $1,572,613 for the Eastern Segment).

Cecil then developed "enhancement factors" to reflect what he claims would be the considerable costs (e.g., ordinary legal, condemnation-related legal, litigation avoidance, community resistance, and time value of money) that would be avoided by the purchase of a ready-made assembled corridor These factors are based on such considerations as the length of the corridor, the sizes of the typical land parcels through which the corridor runs (reflecting the intensity of adjacent development), and the nature of adjacent land use. Applying an enhancement factor of 40% for the more urban, industrial and commercial real estate between Hollis and Mapleton, and 20% for the more rural, agricultural real estate between Mapleton and La Harpe, Cecil obtained an assembled corridor value of $7,009,497 ($4,807,839 for the Western Segment and $2,201,658 for the Eastern Segment).

TP&W acknowledges that a piecemeal, unassembled valuation has traditionally been used for feeder line real estate valuation but asks us to depart from that precedent here. TP&W argues that the piecemeal valuation approach has been used on the theory that the subject line would otherwise be abandoned. Thus, TP&W contends, feeder line cases were viewed as being analogous to abandonment cases, where the

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NLV methodology and a piecemeal land valuation are used to evaluate offers of financial assistance (OFAs) under 49 U.S.C. 10904 (formerly 49 U.S.C. 10905).[FN[FN22]] TP&W points out that the first feeder line case, Indiana Hi-Rail Corp.-Feeder Line Acq., 366 I.C.C. 42 (1981), and most of the other early cases involved lines designated for abandonment. TP&W argues that the La Harpe-Hollis Line has not been designated for abandonment and has a GCV, as demonstrated by the prior sale to SF&L, by KJRY's prior purchase efforts, and by this application. Accordingly, TP&W argues that an assembled-corridor valuation would be more appropriate where, as here, there is a demand for continued rail use. Also supporting the assembled-corridor valuation, TP&W argues, are the other revenue-generating ancillary uses of the right-of-way for electric power lines, telecommunications facilities, and water, storm and sewer pipe lines.

***14** Corridor enhancement factors are contrary to the concept of the NLV-based valuation, which is based on the value of the property to the owner, not to the prospective purchaser. See, e.g., C&NW v. U.S., 678 F.2d at 668-670, citing United States v. Miller, 317 U.S. 369, 375 (1943) (Miller). The only exception has been where documented non-rail uses are established by signed sales contracts or firm offers for all or a portion of a rail corridor. See, e.g., Lake Geneva at 959; Railroad Ventures at 10, modified (STB served Oct. 4, 2000) at 16-17.

Here the use of an enhancement factor for continued rail use in an NLV valuation would not produce a realistic valuation

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under either the liquidation (NLV) or continued rail service (GCV) scenarios. If a right-of-way were purchased as piecemeal real estate, reversionary interests, easements, odd lot sizes and similar factors would affect the prices that the properties could command. If it were purchased as a rail line, the price would be based on its potential to earn revenue by providing rail service, not on the value of the realty for alternative purposes. Through the use of enhancement factors for continued rail use, TP&W seeks to combine into an NLV analysis both the NLV and GCV methodologies to give itself the highest valuation offered by either approach, a result that would blur the statutory distinction between the two methodologies and could not be achieved in the real world. The use of enhancement factors for continued rail use would also violate court precedent that precludes a condemnee from inflating the value of his properties by asking for more than what the property would be worth to him if the property were not taken by condemnation. See Miller, 317 U.S. at 375; CNW v. U.S., 678 F.2d at 668-670.

For his unassembled, or piecemeal, valuation, Cecil analyzed the real estate deeds of the land parcels making up the right-of-way, reduced the acreage of parcels encumbered by road and street rights-of-way, and excluded parcels with reversionary interests. He developed values for the remaining parcels by: (1) locating comparables among the 54 properties referred to in the corridor valuation; (2) dividing the time-adjusted sale price of the appropriate comparables by their acreage to obtain unit values; (3) adjusting the resulting unit values, where necessary, to account for differences in such factors as location, shape, size, access, physical orientation,

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and topography; and (4) multiplying the acreage of the fee-owned parcels by the final unit values of the comparables to obtain values for the fee-owned parcels. He discounted the resulting land values by 8% to account for commissions, administrative costs, advertising, and promotion. He further discounted the values by 5%, on an end-of-year basis, to account for a 3-year sell-off period, reflecting his belief that most of the property is very marketable and likely to sell within a short period of time.[FN[FN23]] This yielded a total piecemeal land valuation of $2,863,173 ($1,906,031 for the Western Segment and $957,142 for the Eastern Segment).

***15** KJRY hired Brian Mooty, an Illinois real estate attorney in practice since 1986, to analyze TP&W's ownership interest in the right-of-way. Mooty examined each of the more than 200 deeds appended to Cecil's verified statement. Dividing the deeds into 18 rows based on their form and language, Mooty concluded that 6 of the 18 rows, equating to 31.657 acres, contained deeds that granted a fee interest and that the other 12 rows contained deeds that granted easements.[FN[FN24]] However, KJRY takes issue with 3.417 acres that Mooty found to be held in fee. KJRY relies on the verified statement of Daniel A. LaKemper, general counsel for KJRY and several other Class III railroads (including railroads that are affiliated with Pioneer and other non-affiliated railroads).[FN[FN25]] KJRY claims that TP&W owns only 28.24 acres of marketable property.

KJRY hired L. Arlen Higgs, an independent, Illinois-certified local real estate appraiser to review Cecil's rail corridor valuation study. Higgs questions the 54 comparable

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land sales used by Cecil, claiming that they involve properties adjoining active rail lines, which are valued higher for their industrial and commercial potential. He also objected to Cecil's adjustments which discounted comparable land values by 10% to 20%. Higgs developed his own analysis, using the sales over a 15-year period of six abandoned Illinois rights-of-way to neighboring or nearby landowners. To account for unusual shapes, left-over ballast, and the limited purchaser pool, he developed an average discount factor of 70%, based on his finding that these six abandoned rights-of-way sold at a 51% to 84% discount.[FN[FN26]] He also adjusted Cecil's sales period projections using a 4-year sell-off period, which he claims is more realistic.[FN[FN27]] Higgs applied the 70% discount factor and 4-year sales period projection to Cecil's $5,227 per acre valuation to obtain an adjusted per acre valuation of $1,568 which it multiplied by the 28.24 acres of marketable property determined by LaKemper, to yield a total land value of $37,140.

The huge discrepancy between the real estate values claimed by TP&W and KJRY chiefly reflects the difference in the acreages claimed to be held in fee. TP&W claims to have a fee interest in approximately 672 acres, whereas KJRY puts that acreage at only 28.24. Cecil is neither an attorney nor an Illinois resident and offers no analysis in support of his acreage figure. He merely lists parcels and identifies them as fee interests. Nor does TP&W warrant the marketability of the title of any of the parcels. By comparison, the title opinion prepared by Mooty, an independent, Illinois-licensed real estate attorney with extensive experience in commercial and residential Illinois real estate, is based on an analysis of the

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deeds. He accepted as fee title quitclaim deeds that purport to transfer fee title, as well as warranty deeds; cited language in those deeds that indicated easements for rail use rather than fee title; and cited state court precedent to support his conclusions. LaKemper is not independent and does not purport to have similar knowledge or experience in Illinois real estate. His rationale for eliminating the 3.417 acres is not supported by a complete title search and not persuasive. Therefore, we rely on Mooty's total of 31.657 acres owned in fee.

***16** The other bases for the discrepancy in real estate valuations are the differences in the parties' appraisal methodologies. As KJRY notes, TP&W's comparables analysis was based on sales of property adjoining active rail lines, not on sales of abandoned rail lines in Illinois. Properties adjoining active rail lines ordinarily command higher prices than abandoned rail properties in a rural area, most of which would be purchased for agricultural purposes.

In contrast, the comparables analysis used by Higgs, an Illinois-certified real estate appraiser, relied on six sales of abandoned rail rights-of-way in Illinois over the past 15 years. The prices commanded by these sales are much lower, yielding a significantly lower discount factor, but the comparisons are more appropriate. We also find that KJRY's argument in favor of a somewhat longer projected sell-off period than that proposed by TP&W is persuasive. Accordingly, we find that the 31.657 acres Mooty determined to be owned by TP&W in fee have a total value of $41,635.

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3. Net Liquidation Value. In sum, we find that the La Harpe-Hollis Line has a total NSV of $3,899,121 ($5,362,6747 in gross salvage value, less $1,463,553 in salvage costs) and an NLV of $3,940,756 ($3,899,121 in NSV and $41,635 in land value).

Financial Responsibility

Under 49 U.S.C. 10907(b)(1)(B), a feeder line applicant must demonstrate that it is "financially responsible." To do so, the applicant must demonstrate that it can (1) pay the value set for the line and (2) cover the expenses of serving the line for at least the first 3 years. 49 U.S.C. 10907(a).

The evidence demonstrates that KJRY would be able to finance its acquisition of the Line. KJRY was found financially responsible in the Board decision served July 9, 2003, based on its submission of: (1) a copy of a letter from the National City Bank of Michigan/Illinois (National City) committing to a $7 million, 5-year loan to finance the purchase of "TP&W's west end;" (2) a copy of a resolution by Pioneer's Board of Directors authorizing Guy L. Brenckman, President of both KJRY and Pioneer and Chief Executive Officer of the latter, and J. Michael Carr, Treasurer and Chief Financial Officer of both KJRY and Pioneer, to close on the bank loan and issue corporate guarantees to ensure that KJRY will have the use of the loan proceeds and other funds to the extent necessary to purchase the La Harpe-Hollis Line and Mapleton Spur and operate them for the 3-year statutory period; and (3) two sets of pro forma financial statements.

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The National City letter specified that the loan had to be accepted and closed on prior to August 31, 2003, but that the date could be extended at the bank's option. KJRY subsequently submitted copies of monthly letters from National City, the most recent of which extends the loan closing date through January 31, 2005, and retains the right to extend further the loan closing date. The National City letters and the resolution of Pioneer's Board of Directors establish that KJRY has the resources needed to finance the purchase of the Line at the price set in this decision.

*17 KJRY has presented an operating plan to show that it could cover the expenses of serving the Line for the first 3 years. KJRY's evidence consists of 3 years of pro forma cash operating statements, along with detailed analyses of carload and revenue projections and a detailed set of footnotes explaining the nature of the proposed operation. KJRY's pro formas assumed an annual debt service based on a NLV of $3,284,605 amortized at 6% over 10 years. They show that, for the 3-year period after the acquisition of the Line, total projected operating revenues would exceed total projected operating expenses by 250%, 267%, and 300%, respectively, and that the annual debt service would not exceed more than 38%, 34%, and 28%, respectively, of projected earnings before income taxes and depreciation.

TP&W contends that KJRY's pro forma statements are fundamentally flawed. TP&W argues that the projected maintenance-of-way (MOW) costs neither reflect the generally accepted minimum per mile nor account for past maintenance deficiencies; that the maintenance-of-equipment

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revenues and expenses are overstated and understated, respectively; that the transportation expenses omit access fees for operating over UP track between Hollis and Peoria and understate fuel, labor (including overtime and layover expenses), and car hire costs; and that the administrative expenses omit management, start-up training, and loss and damage costs, and understate real estate taxes, legal fees, and marketing costs. TP&W also contends that the pro forma statements fail to account for such start-up costs as restoring track, cutting brush around grade crossings, weed control, positioning equipment, negotiating new contracts with connecting carriers, and finding, screening and drug testing new employees. In addition, TP&W contends that the pro forma statements understate the debt service for the purchase of the Line by using an NLV of $3,284,605.

In TP&W's view, KJRY's 3-day a week service plan is too limited to satisfy the needs of large shippers like Roquette, would make it more difficult to meet carload projections, and would result in increased car hire charges and other expenses. Additionally, TP&W argues that KJRY's plan to use the Line to compete with UP and BNSF for overhead traffic is impractical. With a 10 mph speed limit, time-consuming interchanges at Keokuk and Hollis, and connecting lines that operate at 40-70 mph, TP&W claims that the Line would not be able to function as an integral part of a transcontinental movement or attract time sensitive overhead traffic when more efficient lower-cost options are available.

TP&W submitted two restatements of KJRY's pro formas: (1) one uses KJRY's freight revenue projections but reduces

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operating revenues by 6% and increases operating expenses by 73%; and (2) the other adjusts KJRY's freight revenue projections downward, reduces operating revenues by 9% and increases operating expenses by 82%. Under the restated pro formas, the Line would not operate profitably until the second year under KJRY's revenue projections and not until the third year under TP&W's adjusted revenue projections. TP&W contends that the Line would not operate profitably under either set of revenue projections if the Line's debt service is revised upward to reflect its value under any of TP&W's valuations of the Line.

***18** In response, KJRY claims that the MOW costs that it used in its analysis are in fact higher than those used by TP&W both in its analysis of the Mapleton Spur's profitability and its opposition to KJRY's petition in KJRY-Alt. Serv.-TP&W, supra. KJRY dismisses the claim that additional MOW would be needed to make up for former deficiencies, referring to TP&W's statement that the Line is in FRA Class 1 condition and ready to operate. KJRY states that it has not decided whether to seek trackage rights over UP between Hollis and Peoria and, referring to TP&W's Petition to Reject Application at 14, claims that TP&W drastically overstates the access fees that would be incurred if such rights were granted. Additionally, KJRY states that it excluded the administrative and supervisory costs that Pioneer assumes for all of its rail carrier subsidiaries and notes that supervisory costs were also excluded from TP&W's analysis of the Mapleton Spur.

KJRY states that its projected labor costs are based on the

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compensation it pays to its current employees and that overtime would be avoided by filling out the schedules of its existing employees and adding two new employees. Applying TP&W's fuel cost projections, which assume "a train length that could reach around 40 cars (loaded and empty),"[FN[FN28]] KJRY states, would yield 12,480 carload movements a year, a traffic volume significantly larger than its first year projection and inconsistent with TP&W's lower projection. Additionally, KJRY notes that TP&W's 3-year fuel cost projections exceed those of the United States Department of Energy. KJRY contends that its car hire cost projections are based on its years of familiarity with the shippers who use the Line; that TP&W's higher real estate taxes reflect a significant overstatement of the quality of its title; and that TP&W's start-up cost figures are overstated and inconsistent with its claim that the Line is in FRA Class 1 condition and ready to operate.

KJRY's freight revenue projections appear to be based on its knowledge of, and dealings with, the shippers that used the La Harpe-Hollis Line; a 1998 document obtained from TP&W's prior owners that reviewed the Line's traffic and revenue projections; and the knowledge and experience of Catherine Busch, a former marketing manager for TP&W. And while KJRY did not submit specific shipper documentation, the letters of 11 of the overhead and on-line shippers that support the feeder line application,[FN[FN29]] and in particular the November 3, 2003 letter from Roquette,[FN[FN30]] demonstrate that there is significant shipper interest in using the Line. Nevertheless, KJRY's freight revenue projections must be adjusted downward to reflect the loss of traffic from ADM

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and Griffin, and its operating revenue projections must be adjusted downward in the absence of evidentiary support for the significant car repair revenues that are claimed.

KJRY's expense projections and explanatory footnotes appear to be based on forecasts related to Pioneer's system average costs and take into account operating efficiencies that would accrue to KJRY as a Pioneer subsidiary. KJRY's expense projections must be adjusted downward to reflect the reduction in car repair revenues. Otherwise, on a percentage basis KJRY's expense projections appear comparable by category to the expenses of Class I railroads.

***19** With the downward revenue and expense adjustments discussed above, KJRY's pro forma statements appear reasonable, and they more than adequately support KJRY's claim that it would be able to operate the La Harpe-Hollis Line profitably and provide shippers with improved service for the requisite 3-year period. TP&W's restatements of KJRY's pro formas, on the other hand, appear to be based primarily on assertions, assumptions, and conclusions that lack substantive support and are contradicted in a number of instances by statements in TP&W's own submissions.

Exemptions, Trackage Rights, and Prescriptions

Under 49 U.S.C. 10907(g)(1), a feeder line applicant may elect to be exempt from any of the provisions of the Interstate Commerce Act other than the joint rate provisions of chapter 107. KJRY states that it is not requesting any exemptions. Additionally, a feeder line applicant may request trackage

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rights from the selling carrier, 49 U.S.C. 10907(d), and/or a prescription of joint rates and divisions, 49 U.S.C. 10907(f). KJRY does not seek trackage rights or a joint rates and divisions prescription at this time. Instead, it plans to interchange traffic with TP&W at Hollis and/or with UP at or near UP's Sommer Yard.

Labor Protection

Under 49 U.S.C. 10907(c), the Board must require "to the maximum extent practicable, the use of the employees who would normally have performed work in connection with a railroad line subject to a sale under this section." UTU-IL requests that KJRY be required to use TP&W employees under rates of pay, rules, and working conditions no less favorable than those that apply to TP&W employees under collective bargaining agreements with the union. UTU-IL further requests that TP&W employees be permitted to operate KJRY trains without having to resign or be displaced from their jobs with TP&W.

KJRY states that the proposed purchase should not result in displacing current TP&W operating employees, noting that TP&W would continue to have sole access to the Mapleton Spur and has not operated the Line west of Mapleton since December 2001. Similarly, in view of the little track maintenance that has been performed on the Western Segment and the limited track maintenance that has been performed on the Eastern Segment, KJRY claims that there are no TP&W employees who have spent a majority of their working time performing labor that would be discontinued as

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a result of the proposed purchase.

KJRY also states that it does not anticipate needing additional operating employees in the near term to provide service over the Line. To the extent the Eastern Segment requires rehabilitation, KJRY says it would use its own forces or outside contractors. In the event additional employees are needed, KJRY states that it would accept applications from former TP&W employees displaced as a direct result of the proposed purchase and accord them priority over other, equally qualified employees.

***20** Neither TP&W nor UTU-IL has identified any TP&W employees who would be affected as a direct result of the proposed purchase. Considering that TP&W has not operated the bulk of the Line for almost 3 years and will continue to operate the Mapleton Spur as it has in the past, it appears unlikely that TP&W employees would be affected significantly. In the event it must hire new employees to operate or maintain the Line, we will require that KJRY, consistent with the statute and its own assurances, offer employment on a priority basis to qualified TP&W employees who previously worked on the Line. KJRY will not be required, however, to continue the rates of pay, rules, and working conditions that existed under TP&W. See, e.g., Cheney R. Co.-Feeder Line Acq., 5 I.C.C.2d 250, 275 (1989).

Closing Terms

To ensure the smooth transfer of the 76-mile La Harpe-Hollis Line, the following terms traditionally used in OFA

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and feeder line proceedings will be imposed: (1) payment must be made by cash, certified check, or electronic transfer to an account designated by TP&W at closing; (2) closing must occur within 90 days after the service date of this decision; (3) TP&W must convey all property by quitclaim deed; (4) TP&W must deliver all releases from any mortgages and original documents conveying interest in the right-of-way to KJRY within 90 days from closing; (5) all taxes must be prorated as of the date of closing; and (6) deed recording fees must be paid by KJRY. Mortgage or lien release taxes or recording fees must also be paid by TP&W. TP&W will be required to turn over to KJRY, within 30 days after closing, all TP&W records concerning the property being purchased, including any and all deeds, valuation maps, easement records, engineering drawings, contracts, bridge inspection records, and all other records related to the property being purchased. The terms of sale may be modified by mutual agreement.

Environmental Concerns

We adopt the analysis and conclusions contained in the environmental assessment (EA) prepared by the Section of Environmental Analysis, served on December 29, 2003. For the reasons set forth in the EA, we conclude that the proposed feeder line sale would not significantly affect the human environment or the conservation of energy resources.

It is ordered:

1. KJRY's petition to reject the supplement filed by TP&W

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on March 17, 2004, and TP&W's motion to strike the supplement filed by KJRY on June 8, 2004, are denied.

2. KJRY's feeder line application to purchase the 76-mile La Harpe-Hollis Line is granted.

3. The purchase price for the Line is set at $3,940,756, and the other terms of sale are prescribed as set forth in this decision.

4. KJRY must notify the Board and TP&W by December 2, 2004, whether it wishes to proceed under the terms prescribed in this decision. That date will be adjusted in a later decision if TP&W supplements the record with a composite monthly average unit price for reroll within the 30-day period provided in the decision.

***21** 5. KJRY must hold open until December 2, 2004, its offer to enter into the trackage rights agreement contained in Appendix 3, Exhibit C, of KJRY's June 9, 2003 Supplement. That date will be adjusted if TP&W supplements the record on reroll.

6. KJRY must offer employment on a priority basis to qualified TP&W employees who worked on the Line in the event KJRY must hire new employees to operate or maintain the Line.

7. This decision is effective on November 27, 2004.

Vernon A. Williams

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Secretary

APPENDIX A
TABLETABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE
APPENDIX B

cols = 6colWidth = 7

Description	KJRV Estimate (71.5 miles)	KJRV Estimate[FN 33] (76 miles)	TP&W Oct. 16, 2003 Estimate (76 miles)	TP&W Mar. 17, 2004 Estimate (76 miles)	STB (76 miles)
Rail, all	$1,914,420	$2,030,902	$4,349,785	$4,949,068	$3,610,167
OTM	$382,884	$412,004	$1,053,191	$1,523,834	$917,075
Ties and Ballast	$691,529	$735,355	$691,004	$691,005	$735,051
Signals	0	0	$78,000	$78,000	0
Turnouts	N/A	N/A	$121,305	$127,576	$100,381
Gross Salvage Value	$2,988,833	$3,178,261	$6,293,285	$7,369,483	$5,362,674
Liquidation Costs	N/A	N/A	($1,502,553)	($1,502,553)	($1,463,553)
Total NSV	$2,988,833	$3,178,261	$4,790,733	$5,866,930	$3,899,121
Real Estate	$100,000	$106,336	$2,863,173	$2,863,173	$41,635
TOTAL NLV	$3,088,833	$3,284,605	$7,653,906	$8,730,103	$3,940,756

APPENDIX C

cols = 3colWidth = 16

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Composite Prices for No. 1 Heavy Melting Steel Scrap

	American Metal Market	Iron Age
Period	$/ton	$/ton
Apr-03	$119.80	$115.92
May-03	$109.04	$107.38
Jun-03	$106.13	$104.57
Jul-03	$111.21	$109.63
Aug-03	$123.32	$119.17
Sep-03	$128.35	$125.83
Oct-03	$130.67	$127.92
Nov-03	$144.03	$141.29
Dec-03	$159.88	$155.50

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Jan-04	$177.47	$179.84
Feb-04	$224.09	$222.50
Mar-04	$250.05	$238.13
Apr-04	$208.76	$201.33
May-04	$170.55	$161.25
Jun-04	$165.00	$160.33
Jul-04	$215.30	$214.96
Avg. Apr 03-July 04	$158.98	$155.35
Average for both sources	**$157.16**	

***22** Note: Data obtained from the October 2004 edition of the Mineral Industry Surveys for Iron and Steel Scrap, which is published monthly by the United States Geological Survey.

FN1. SF&L Railway, Inc.-Acquisition and Operation Exemption-Toledo, Peoria and Western Railway Corporation Between La Harpe and Peoria, IL, STB Finance Docket No. 33995 (STB served and published at 66 FR 9410-11 on Feb. 7, 2001).

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FN2. When this provision (formally codified at 49 U.S.C. 10910) was originally enacted in 1980, Congress gave it the title "Feeder Railroad Development Program." Feeder lines are branch lines that "feed" traffic onto the main lines. Congress projected that branch lines, rather than main lines, would be the likely candidates for applications under section 10907.

FN3. The Railway Guide is the railroad industry catalogue of points served by every rail carrier in the country.

FN4. KJRY Reply, Exhibit 1.

FN5. Id., Exhibit 2.

FN6. Id., Exhibits 3, 4, and 7.

FN7. TP&W Comments at 76 (V.S. Michael J. Klass).

FN8. KJRY Application at 123.

FN9. Id. at 128.

FN10. Id. at 132.

FN11. See SF&L I and SF&L II.

FN12. See SF&L Railway, Inc.-Abandonment Exemption-in Hancock, McDonough, Fulton and Peoria Counties, IL, STB Docket No. AB-448 (Sub-No. 2X) (STB served Sept.

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23, 2002); SF&L II (dismissing SF&L's petition for an abandonment exemption and denying TP&W's motion to substitute itself for SF&L).

FN13. See KJRY Supplement, Appendix 3, Exhibit C.

FN14. TP&W Comments at 48 (V.S. of Wilson).

FN15. This figure reflects a computation error on KJRY's part, as it includes both KJRY's original land value for the Line ($106,336) and its revised land value ($37,140). The correct figure should be $3,215,409.

FN16. KJRY's decision to exclude the Spur from its application moots an issue raised in its initial proposal, i.e., whether part of the property sought to be acquired could be valued using the NLV methodology and the other part could be valued using the GCV methodology.

FN17. Because KJRY originally presented its valuation estimates in two parts, one for the western 71.5 miles, the Western Segment, and the other for the eastern 4.5 miles, the Eastern Segment, our analysis is set out in two parts, even though both are valued using the NLV standard.

FN18. Relay rail is rail that has been used and may be used again -"relaid"- in its present condition.

FN19. TP&W Comments at 89 (V.S. of Garvin).

FN20. An across the fence or comparables analysis

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identifies properties that are adjacent to or near the parcels being valued.

FN21. TP&W Comments at 112-115 (V.S. of Cecil).

FN22. See Chicago and North Western Transp. Co.-Abandonment, 363 I.C.C. 956 (1981) (Lake Geneva), aff'd sub nom. Chicago and North Western Transp. Co. v. United States, 678 F.2d 665 (7th Cir. 1982) (C&NW v. U.S.); Railroad Ventures, Inc.-Acquisition and Operation Exemption-Youngstown & Southern Railroad Company (Request to Set Terms and Conditions), STB Finance Docket No. 33385 (STB served Jan. 7, 2000) (Railroad Ventures).

FN23. TP&W Comments at 117-120 (V.S. of Cecil).

FN24. KJRY Reply (V.S. of Mooty).

FN25. KJRY Reply, Exhibit 18 (V.S. of La Kemper) at 7 (analyzing the deed on page 189 of the Addendum to Cecil's verified statement).

FN26. KJRY Reply at 52-53.

FN27. KJRY Reply at 53-54 and n.27.

FN28. TP&W Comments at 169 (V.S. of W. Graham Claytor).

FN29. KJRY Application, Appendix 3, Exhibit A.

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FN30. KJRY Reply, Exhibit 15.

FN31. The figures in this column do not add up because KJRY prorated the Line from 71.5 miles to 77.5 miles (instead of the actual 78.5 miles) and then used a cost-per-mile figure based on 71miles (instead of the actual 71.5 miles) when it reduced the length of the Line to 76 miles, reflecting its decision to exclude the Mapleton Spur from its application. As a result of these rounding and proration errors, KJRY's NLV figure of $3,284,605 is $8 higher than the actual sum of its NSV and real estate figures ($3,178,261 + $106,336 = $3,284,597).

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SUPREME COURT, U.S.

No. 06-792

In the Supreme Court of the United States

TOLEDO, PEORIA & WESTERN RAILWAY, PETITIONER

v.

SURFACE TRANSPORTATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Surface Transportation Board (STB) violated the Just Compensation Clause of the Fifth Amendment when, in light of significant volatility in the steel market, it calculated a railroad line's net liquidation value using a 16-month average of the price of steel, rather than the spot price of steel on the date that the line was sold.

2. Whether the STB's valuation methodology was inconsistent with the agency's prior decisions.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-51) is reported at 462 F.3d 734. The initial decision of the Surface Transportation Board (STB or Board) (Pet. App. 83-132) is not yet reported. The Board's decision on reconsideration (Pet. App. 52-82) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2006. The petition for a writ of certiorari was filed on December 6, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenged the Board's valuation of a railroad line for purposes of a statutory forced sale. On

petition for judicial review, petitioner contended that the Board's valuation methodology violated the Just Compensation Clause of the Fifth Amendment. The court of appeals affirmed the Board's decision, holding that petitioner had waived its constitutional challenge and that the argument was without merit. Pet. App. 1-51.

1. Under the Interstate Commerce Act (the Act), ch. 104, 24 Stat. 379,[1] the Nation's railroads, though privately owned, have a common-carrier obligation to serve shippers on their lines. 49 U.S.C. 11101(a). To be relieved of that obligation for a particular line, a railroad must obtain the Board's permission to abandon the line or discontinue service over it. See 49 U.S.C. 10903; 49 U.S.C. 10502. Otherwise, if a railroad fails or refuses to serve shippers on the line, it violates its common-carrier obligation and may be subject to injunctive relief and damages. See 49 U.S.C. 11701-11704; *GS Roofing Prods. Co.* v. *STB*, 143 F.3d 387, 391 (8th Cir. 1998).

A Board order awarding damages and directing an unwilling rail carrier to provide service can be less advantageous to shippers than operation of the line by a willing railroad. For that reason, the Act authorizes the Board under certain circumstances to force the sale of a line to another carrier that is willing and able to provide the service needed. Under the Act's "feeder line" development provision, the Board may order a railroad to sell a line if the Board finds, as pertinent here, that

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[1] The Act was amended by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (49 U.S.C. 10101 *et seq.*), which created the STB to assume various regulatory functions of the former Interstate Commerce Commission (ICC). Among those functions is implementation of the feeder-line railroad development provision at issue here, which is now codified at 49 U.S.C. 10907.

service to shippers over the line is inadequate. See 49 U.S.C. 10907(b)(1)(A)(i). The feeder-line provision allows the Board to address deteriorating rail service on secondary railroad lines and to preserve those "feeder lines" prior to their total downgrading. See *Caddo Antoine & Little Mo. R.R.* v. *United States*, 95 F.3d 740, 744 (8th Cir. 1996); H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 124 (1980).

If the Board directs the sale of a line under the feeder-line provision and the parties cannot agree on terms, the Board must set the price at no less than the "constitutional minimum value." 49 U.S.C. 10907(b)(1); see *GS Roofing Prods. Co.* v. *STB*, 262 F.3d 767, 771 (8th Cir. 2001). For purposes of a feeder-line sale, the "constitutional minimum value" is the higher of the line's net liquidation value (NLV) (the likely proceeds if the property were sold for non-rail use) or its going-concern value (GCV) (its value as an operating railroad). 49 U.S.C. 10907(b)(2). Although a Board order directing the sale of a line is binding on the seller, the prospective buyer may choose not to proceed if it is unwilling to accept the terms set by the Board. See 49 C.F.R. 1151.2(h).

2. a. In 2000, petitioner sold the bulk of a 76-mile rail line to SF & L Railway, Inc. (SF & L). Pet. App. 7. "The sale was challenged and, finding that SF & L's purpose was to abandon and salvage the line, the STB revoked SF & L's authority to acquire the line and directed that [petitioner] retake possession." *Ibid.* Respondent Keokuk Junction Railway Company (Keokuk), a connecting railroad, then sought authority to provide temporary alternative rail service over the line. *Id.* at 85-86. In opposing Keokuk's request, petitioner assured the Board that it would resume operations over the seg-

ment after reacquiring the line. *Id.* at 86. Petitioner did not resume operations, however, but instead drove away all existing and potential new shippers. *Id.* at 89-92.

b. Keokuk filed an application under the feeder-line provision, asking the Board to require petitioner to sell the line to it. Pet. App. 8. In responding to the application, petitioner took issue with, inter alia, Keokuk's valuation of the line. *Id.* at 11. To establish the value of the track and other materials under an NLV approach, petitioner submitted the analysis of its expert, who calculated the net salvage value of the track based on then-recent steel prices in the spot market. *Ibid.* Keokuk contested the expert's analysis, and the parties proffered a series of submissions intended to document various upward and downward shifts in the price of steel. See *id.* at 15, 41, 54.

3. On October 28, 2004, the Board issued a decision finding that Keokuk had met the statutory criteria for forcing the sale of the line. Pet. App. 83-132. Among its findings, the Board determined that petitioner had refused to provide adequate rail service, and that the sale to Keokuk would likely result in improved service for shippers. *Id.* at 89-92, 98.

The Board then addressed the valuation of the line. With respect to the salvage-value component of the NLV, the Board determined that, given the recent volatility in steel prices and the time that had elapsed since Keokuk filed its application, it would not be appropriate to select a single date for the purpose of identifying the price of steel. See Pet. App. 105-106. Instead, the Board calculated a composite monthly average over 16 months—from April 2003 (when Keokuk's application was filed) through July 2004 (the last month of then-available, verifiable data)—based on industry data regu-

larly collected and published by the United States Geological Survey. *Id.* at 106. The Board found the line's NLV to be $3.9 million. *Id.* at 116.

Petitioner filed a timely petition for reconsideration. See Pet. App. 53. As relevant here, petitioner argued that the Board had failed to adhere to its precedents when it averaged the price of steel over a 16-month period instead of valuing it on the date of the decision. See *id.* at 63, 73. Petitioner tendered evidence of the price of steel as of November 1, 2004 (the date it claimed that it would have chosen to sell the salvageable material if the sale were voluntary), and it urged the Board to use that evidence in calculating the line's NLV. See *id.* at 63.

On February 7, 2005, the Board granted in part and denied in part petitioner's petition for reconsideration. Pet. App. 52-82. The Board reaffirmed its decision to calculate the price of steel using a 16-month average, although it accepted a small adjustment in the data that increased the NLV to approximately $4.2 million. See *id.* at 73-75, 80.

4. Petitioner sought judicial review of the Board's decision in the court of appeals. See Pet. App. 6; 28 U.S.C. 2321(a) and 2342(5). Relying on *Kirby Forest Industries, Inc.* v. *United States*, 467 U.S. 1 (1984), petitioner argued that the Fifth Amendment required the Board to calculate the value of the railroad line at the spot steel price on the date of the taking. See Pet. App. 26-27 & n.16, 32-33. Petitioner further "contend[ed] that the date of taking in this case was on or about February 7, 2005, and that the STB was required to calculate the value of the line according to market conditions on that date." *Id.* at 33.

The court of appeals affirmed the Board's decision. Pet. App. 1-51. The court held that petitioner had waived its Fifth Amendment challenge to the STB's valuation methodology by failing to raise that argument before the Board. *Id.* at 27 n.16, 33. The court explained that petitioner "did not raise a Fifth Amendment challenge to the STB's valuation methodology in agency proceedings." *Id.* at 27 n.16. The court of appeals further observed that petitioner "did not cite *Kirby Forest* before the STB and, in fact, urged the STB to calculate the market price of steel as of November 1, 2004, the date of the STB's valuation decision, not as of February 7, 2005, the date that the sale of [petitioner's] line to [Keokuk] became final." *Id.* at 33.

The court of appeals also stated that, "[e]ven if [it] were to reach the merits of [petitioner's constitutional] argument," the court "would find it lacking." Pet. App. 33. The court of appeals relied on this Court's statement in *Kirby Forest* that the market value of taken property on the date of appropriation might be an improper measure of just compensation if that value is too difficult to determine or its application would result in manifest injustice. *Id.* at 34 (citing *Kirby Forest*, 467 U.S. at 10 & n.14). In this case, the court of appeals held, the Board's valuation methodology was constitutionally permissible under *Kirby Forest* because (1) the unusual volatility in the steel market made it "too difficult" to pinpoint that commodity's market value, and (2) the inflated prices of steel on the date of final sale and the date of appropriation did not represent fair market value and would result in "manifest injustice." *Ibid.* The court also found that the Board's use of average steel prices "more accurately reflected the line's probable value on the open market than did the artificially

inflated market price of steel as of November 1, 2004," *id.* at 30-31, and it rejected petitioner's argument that the STB's decision to use price averaging was inconsistent with Board precedent, see *id.* at 35-38.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Based on its review of the administrative record, the court of appeals correctly held that petitioner had waived the argument that the Board had violated the Just Compensation Clause by using an average of spot steel prices to calculate the rail line's NLV. See Pet. App. 27 n.16. That waiver determination implicates no novel or important legal issues, and petitioner does not contend that the Seventh Circuit's waiver analysis itself warrants this Court's review. And because petitioner's failure to raise its current arguments before the agency provides an independent basis for affirmance of the court of appeals' judgment, this case would be an unsuitable vehicle for resolution of the underlying constitutional question even if that issue otherwise warranted this Court's review.

Before the STB, petitioner did not argue that the Just Compensation Clause foreclosed averaging, it did not cite *Kirby Forest*, and it did not claim that the Board should use the price of steel on the date of sale in determining the NLV of the line. Instead, petitioner contended that averaging was inconsistent with agency precedent. It argued initially for a valuation based on "recent" steel prices. See Pet. App. 105; Comments in Opp. to Application at 41, Finance Docket No. 34335 (STB filed Oct. 17, 2003) (Doc. No. 209,135). On reconsidera-

tion, petitioner urged the Board to value the line using the spot price of steel on November 1, 2004, two business days after the Board's original decision ordering the sale—a decision that, by its terms, was not scheduled to become effective until November 27, 2004, see Pet. App. 63, 125.

Petitioner cited *Kirby Forest* for the first time in the court of appeals. Petitioner argued on judicial review that the Board was required to use, not "recent" steel prices or prices at the time of the Board's original decision, but rather steel prices as of the closing date for the sale of the line. See Pet. App. 33. Petitioner contends (Pet. 14) that "[i]nherent in any argument challenging [the] Board's valuation of property taken under the Act is in fact a challenge to whether that valuation provides just compensation for the property." Whatever the merits of that contention in other circumstances, it is incorrect here. Petitioner's brief in the court of appeals did not simply advance an additional legal theory in support of a consistent substantive position, but instead advocated a valuation date *different* from the ones that petitioner had urged before the Board. The court of appeals properly concluded that petitioner had waived that argument by not presenting it to the agency. See *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (holding that a reviewing court should not overturn an administrative decision unless the agency erroneously denied an objection presented to it).

2. In any event, the Board's analysis is consistent with this Court's Just Compensation Clause jurisprudence. In most condemnation cases, just compensation is the fair market value of the property on the date it was taken. See, *e.g.*, *United States* v. *564.54 Acres of Land*, 441 U.S. 506, 511-513 (1979). Under that stan-

dard, the owner of condemned property generally is entitled to receive "what a willing buyer would pay in cash to a willing seller" at the time of the taking. *Id.* at 511 (quoting *United States* v. *Miller*, 317 U.S. 369, 374 (1943)). An alternative measure of just compensation may be employed, however, either when "the market value [is] too difficult to find, or when its application would result in manifest injustice to owner or public." *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 123 (1950). This Court's decision in *Kirby Forest Industries, Inc.* v. *United States*, 467 U.S. 1 (1984), did not change either the general standard for determining just compensation or the circumstances in which that standard can be supplanted by another formula. See *id.* at 10.

In assessing the constitutional minimum value (*i.e.*, the NLV) of the rail line at issue here, the Board acted in accordance with the foregoing principles. The Board found that the spot price for steel was extremely volatile and unstable during the course of the proceedings before the agency. Pet. App. 30-31. Under those circumstances, the Board "concluded that calculating the statutory constitutional minimum value of the line by averaging the price of steel from April 2003 to July 2004 * * * more accurately reflected the line's probable value on the open market than did the artificially inflated market price of steel as of November 1, 2004." *Ibid.*

The Board's averaging methodology thus was not a departure from the fair-market-value standard for measuring just compensation, but was instead a reasonable approach to determining the price the line would likely have commanded on the open market. At a time when the spot price for delivered steel is fluctuating dramatically from month to month, a willing buyer of a rail line

would not necessarily value the salvageable steel based solely on its spot price on the day of purchase. Rather, such a buyer might be concerned that the spot price would drop before the steel could be salvaged and sold. Similarly, a willing seller would not necessarily relinquish the property based on the current spot steel price if it believed that the price on the day the line was to be sold was aberrationally low. The Board's valuation methodology was therefore fully consistent with the general rule that just compensation for taken property is the fair market value of the property on the day of the taking.[2]

In any event, as the court of appeals explained, this Court's decisions do not establish a per se rule that just compensation must always be measured by the fair market value of the property on the date of the taking. Pet. App. 34. Rather, an alternative measure of just compensation may be used if actual market value on the relevant date is too difficult to ascertain, or if that measure of just compensation would effect "manifest injustice to owner or public." *Kirby Forest*, 467 U.S. at 10 n.14. The court of appeals' affirmance of the Board's decision on that alternative ground, see Pet. App. 34-35, reflects a correct, and entirely factbound, application of this Court's precedents.

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[2] Petitioner argues (Pet. 14) that the court of appeals should have reviewed the Board's valuation of the rail line de novo. The court's application of a narrow and deferential standard of review (see Pet. App. 28) is consistent with decisions of other circuits in comparable cases, see, *e.g.*, *Borough of Columbia* v. *STB*, 342 F.3d 222, 235 (3d Cir. 2003); *GS Roofing Prods. Co.* v. *STB*, 262 F.3d 767, 774 (8th Cir. 2001); *Iowa Terminal R.R.* v. *ICC*, 853 F.2d 965, 969-971 (D.C. Cir. 1988), and petitioner cites no contrary authority.

As the court of appeals explained, "[m]arket fluctuation over the course of proceedings made it 'too difficult' to pinpoint the fair market value of [petitioner's] materials." Pet. App. 34 (quoting *Kirby Forest*, 467 U.S. at 10 n.14). In addition to the difficulties of determining the fair market value of a rail line on a given date during a period of wildly fluctuating commodity prices, use of the spot price of steel on the date of the line's sale would threaten manifest injustice to the public by jeopardizing the operation of the feeder-line program. Under petitioner's theory, an acquiring carrier would be forced to agree to purchase a line at a time when the final price was indeterminate and subject to revision—a risk that many potential acquiring carriers might be unwilling or unable to take.[3]

3. Petitioner argues (Pet. 21-25) that the Board acted arbitrarily and capriciously by departing without explanation from its own prior decisions. The court of appeals correctly rejected that contention. See Pet. App. 35-37. The court explained that the Board precedent on which petitioner relied was inapposite, and that "the STB has averaged prices to account for market fluctuations during feeder line proceedings" in circumstances comparable to those presented here. *Id.* at 36. In any event, petitioner's claim of agency inconsistency is wholly factbound and presents no issue warranting this Court's review.

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[3] Petitioner also objects (Pet. 24-25) to the Board's choice of the precise time period over which to calculate the average price of steel. The court of appeals held that petitioner had waived that challenge, see Pet. App. 38 n.20, and petitioner does not contest that ruling. In any event, this factbound challenge to the details of the Board's valuation methodology raises no issue of recurring legal importance that might warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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